82-1138

No. ..-...
IN THE

Supreme Court of the United States

October Term, 1982

VOLVO OF AMERICA CORPORATION, a Delaware corporation; and AKTIEBOLAGET VOLVO, a Swedish corporation,
Petitioners,

vs.

CHARLENE P. ROSACK, on behalf of others similarly situated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

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Respondent.

Question Presented.

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibit a state court from certifying a class action where the only named plaintiff is not a member of the class she purports to represent?

Parties to the Proceedings Below.

Petitioners Volvo of America Corporation and Aktiebolaget Volvo were defendants and respondents in the proceedings before the Court of Appeal of the State of California below. Volvo Western Distributing, Inc. was also named as a defendant and respondent in those proceedings, but this former subsidiary of Volvo of America no longer exists.

Respondent Charlene P. Rosack was the plaintiff and appellant before the Court of Appeal below, on behalf of others similarly situated.

Petitioners' statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix hereto at page E43.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

Petitioners Volvo of America Corporation and Aktiebolaget Volvo respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California entered in these proceedings on May 18, 1982.

Opinions Below.

The opinion of the Court of Appeal of the State of California is reported at 131 Cal. App. 3d 741, 182 Cal. Rptr. 800 and is set forth commencing at page A1 of the Appendix hereto. The unpublished memorandum decision of the Superior Court of the State of California for the County

of San Mateo is set forth at page B27 of the Appendix hereto.[1]

Jurisdiction.

The judgment of the Court of Appeal of the State of California was entered on May 18, 1982. A petition for hearing in the California Supreme Court was timely filed on June 28, 1982 and was denied on August 25, 1982. Thereafter, on November 15, 1982, Mr. Justice Rehnquist signed an order extending the time for filing this petition for certiorari to and including January 3, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The statutory provisions involved are Section 16750 of the California Business and Professions Code, Section 382 of the California Code of Civil Procedure and Section 1781 of the California Civil Code. These statutory provisions are set out at page C35 of the Appendix.

Statement of the Case.

Incredible as it may seem, the California Court of Appeal has certified an antitrust class of 50,000 people with a single representative plaintiff who is:

1. not typical of the class;
2. not representative of the class; and

---

[1]Additional decisions in the case below include the Order Setting Aside Magistrate's Findings and Recommendation and Remanding Action to the state court, 421 F. Supp. 933 (N.D. Cal. 1976); the amended Statement on Application for Stay, (Rehnquist, J.), 429 U.S. 1331 (1976); and a denial of certiorari, 430 U.S. 915 (1977).

3. not injured by the alleged antitrust violation.

This decision by the California Court of Appeal violates the due process protections that this court has laid down for class actions in the cases of *Hansberry v. Lee*, 311 U.S. 45 (1940) and *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977).

This is an antitrust class action comprised of an alleged 50,000 members. Volvo is the only defendant. The Court of Appeal has certified the class despite finding that the only named plaintiff is not typical or representative of the class. The only question on this writ is whether it is unconstitutional to certify a class without a named plaintiff who is representative or typical of the class and who lacks standing to pursue her individual claim. The California Court of Appeal has certified respondent Charlene Rosack as the class representative despite a finding by the Trial Court, not overturned on appeal, that Rosack is not typical or representative of the purported class. If this invalid certification is allowed to stand, Volvo will be denied due process and forced to endure the agonies of an antitrust class action with 50,000 alleged class members (all Volvo purchasers in California between 1972 and 1976) and with an alleged exposure estimated by plaintiff to be between $30 million and $50 million.

The certification below is particularly suspect because respondent Rosack, a California plaintiff's attorney, is the only consumer to have ever complained of the alleged antitrust violation, because she is not representative of the putative class, and because she did not suffer any injury. Allowing the certification of Rosack under these circumstances is unprecedented and would deny Volvo its due process right to a full, fair and final adjudication.

Petitioners Aktiebolaget Volvo and Volvo of America Corporation (collectively referred to as "Volvo") are engaged in the manufacture and sale of Volvo automobiles, parts and accessories.

Respondent Charlene P. Rosack is a California resident who purchased a new 1972 model Volvo from an independent Volvo dealer. Respondent paid for her Volvo in cash, without any trade-in allowance. And, in a market where virtually all retail sales are the result of hard bargaining, respondent actually paid $612 *more* than the manufacturer's suggested retail price. This so-called "Monroney" sticker price ("sticker price") is required by federal law to be affixed to the vehicle by the manufacturer (15 U.S.C. §§ 1231-1232), and it commonly serves as the starting point for customer bargaining. The actual sticker price varies with the model of car, optional equipment, and time of model year.

On March 12, 1976, respondent brought this action in the Superior Court of the State of California for the County of San Mateo on her own behalf and, under Section 382 of the California Code of Civil Procedure, on behalf of a class of all purchasers of Volvo automobiles in the State of California.

The Complaint alleges that Volvo engaged in retail price maintenance in violation of California's antitrust legislation (California Business and Professions Code § 16700 et seq.). Volvo allegedly forced and agreed with 64 independent dealers to grant little or no discount from the "Monroney" sticker price.

Thus, the class consists of those people who purchased *below* the Monroney sticker price. The sticker price or any

price above that is not alleged to be fixed and cannot be under federal law.[2]

Respondent moved in the trial court to certify a class of all persons who purchased a new Volvo automobile from a California Volvo dealer between 1972 and 1976 (approximately 50,000 persons). The only factual showing made in support of this motion consisted of the following:

1. An affidavit of plaintiff that she purchased a Volvo automobile during the time period in question;

2. An affidavit from her lawyer stating that he was familiar with class actions; and

3. An affidavit from another lawyer stating that he was familiar with a particular magazine which included automobile registration statistics.

No other evidence relating to the class issue was submitted by respondent.[3]

In opposition to respondent's motion, Volvo submitted undisputed evidence that:

(1) each sale of a Volvo was an individually negotiated transaction dependent upon factors such as trade-ins, market availability, the Monroney sticker price, the season of the year, the dealer's inventory, and many other factors (C.T. at 380, et seq.);

---

[2]Respondent does not allege that the federally-mandated sticker price is illegal or price fixed; indeed she cannot. *See In re Nissan Antitrust Litigation*, 577 F.2d 910, 916 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

[3]In light of the California Court of Appeal's subsequent ruling, this showing will be deemed sufficient under California law to embroil a defendant manufacturer in costly and complex class action litigation. So that the Court may appreciate the true significance of the decision below, the respondent's entire showing is set forth in the Appendix hereto at page D37. Other citations to the record below refer to the Clerk's Transcript ("C.T.") prepared in connection with respondent's appeal of the Trial Court's order denying class certification.

(2) the Monroney sticker price may vary throughout the model year and is different depending upon the model of the car and the accessories with which it is equipped (C.T. at 760-762, ¶ 6);

(3) Volvos identical to that purchased by respondent were sold by the same and different dealers at widely varying prices at or near the time respondent purchased her car (C.T. 767, 770-772);

(4) respondent paid $612 *more* than the sticker price for her Volvo (C.T. at 785-787); and

(5) affidavits of all California Volvo dealers stating they did not engage in price-fixing and that they sold the cars for any price they wished.

On May 22, 1978, the Trial Court filed a memorandum of decision denying class certification (Appendix, B27). In its opinion, the Trial Court made, *inter alia*, the following findings of fact:

> 1. Plaintiff failed to prove that she was representative of the putative 50,000 class members.[4] Plaintiff's cash purchase at a price *above* the federally required Monroney sticker price was not "typical of any other purchaser." (Appendix, B33).
>
> 2. Plaintiff failed to establish that impact or "fact

---

[4]The Trial Court could have cited other important reasons for doubting respondent's representative status. Respondent Rosack is no ordinary consumer, she is an attorney who works for a plaintiff-oriented litigation firm. Her class action attorneys include one who was the named plaintiff in a case where certification was denied in part due to the court's concerns about attorney-generated class actions. *See Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972). The same attorneys were involved in *In re Hotel Telephone Charges*, 500 F.2d 86 (9th Cir. 1974), where the court observed:

> Whenever the principal, if not the only, beneficiaries to the class action are to be the attorneys for the plaintiffs and not the individual class members, a costly and time-consuming class action is hardly the superior method for resolving the dispute.

500 F.2d at 91.

of injury" could be established on a class-wide basis Specifically, the Trial Court found that: (a) The retail automobile market is notorious for haggling and negotiations in purchasing (Appendix, B32); (b) Plaintiff's attempts to explain a class-wide proof of injury based upon a series of attorney-generated graphs were "conjecture," and no evidence or experts showed that these arguments "went beyond speculation" (Appendix, B31); (c) In a market notorious for haggling and individually-negotiated purchases a general presumption of injury to each member of the class was inappropriate. (Appendix, B32).

3. Finally, the Trial Court found that this proposed class action was "utterly unmanageable." The complexities of proof of damages for some 50,000 possible purchasers, and the lack of any workable class-wide formula to consider individual variations (such as model, year, discount, trade-in allowance, financing and equipment) made difficulties of proof in this proposed class action "overwhelming" (Appendix, B33).

The Trial Court dismissed the class allegations in the Complaint and entered a final order dismissing the class action on June 21, 1978. An appeal followed.

The Court of Appeal did many amazing things on appeal, among them:

1. It affirmed the Trial Court's finding that the named plaintiff was atypical and unrepresentative of the class, but ordered class certification anyway; and

2. Without any new evidence it overturned the Trial Court's other factual findings.[5]

The Court of Appeal entered its original judgment granting a writ of mandamus on May 28, 1981. The writ directed the trial court to vacate its order denying class certification *without remanding the case for further factual findings on the class certification issues*, and to enter an order granting class certification.

The Court of Appeal's decision left standing the Trial Court's finding that respondent was not a member of the purported class of Volvo purchasers. In fact, the Court of Appeal explicitly "deferred" to the Trial Court's finding on that issue (Appendix, A24). At the same time, the Court of Appeal ordered that respondent be certified as the sole named class representative (Appendix, A25).

The Court of Appeal saw no contradiction in this result, because it also ruled that a class action could proceed even if some class members were not injured at all:

> If base prices are raised, generalized injury results regardless of the purchaser's individualized negotiating

---

[5]The Court of Appeal held that:

1. While plaintiff was unrepresentative of the purported class claims, that fact was of no "import" because any Volvo purchaser could represent all others (Appendix A24);

2. In an antitrust case, once a price-fixing conspiracy is established, there is a potential presumption of class-wide injury, no matter what the nature of the alleged conspiracy, the nature of the market or the product, or the purchaser's individual negotiating abilities (Appendix, A20); and

3. It was "not clear" that the Trial Court denied certification due to lack of manageability. In any event, the case was manageable since "Speculative problems with regard to computation of damages" did not preclude class certification (Appendix, A24).

The Court of Appeal found the order denying class certification to be non-appealable and instead treated respondent's appeal as an application for a writ of mandate. Under California law, such a writ proceeding is a distinct suit, and the judgment finally disposing of that proceeding is a final judgment.

abilities. *The possibility that some members of the class may be injured to a lesser extent or even not at all will not . . . defeat class certification.*

(Appendix, A20, emphasis supplied).

By certifying a class without a representative or typical plaintiff, the Court of Appeal deprived Volvo of the following fundamental due process rights:

(1) The right to a representative plaintiff guaranteed under *Hansberry v. Lee, supra,* and *East Texas Motor Freight v. Rodriguez, supra*;

(2) Volvo has no way to assert its defense against the class claims through the named plaintiff because her claims are not those of the class;

(3) Volvo will be unable to fully adjudicate the claims of absent class members because respondent does not share the same interest and has not suffered the same injury as the class she purports to represent;

(4) Volvo will be unable to exercise its right of confrontation and cross-examination as to class claims because respondent is not a member of the class, and

(5) Volvo is denied its right to a final adjudication of the claims of absent class members because any judgment in the underlying class action will be subject to collateral attack on the ground that respondent was not representative of the class.

Volvo immediately challenged this unprecedented and unanticipated result in its petition for rehearing filed in the Court of Appeal on June 12, 1981:

> [The Court of Appeal's] directions to the trial court to certify the class in the absence of a representative plaintiff is . . . unconstitutional under the California and United States Constitutions.
>
> * * *
>
> Certification of this class deprives Volvo of its right to Due Process and Equal Protection of the Laws.

(Volvo Petition for Rehearing at 2, 6).

The Court of Appeal granted Volvo's petition for rehearing, but one year later it reissued its opinion with only minor modifications (Appendix, A25).

Volvo next petitioned the California Supreme Court for a hearing and in its brief elaborated on the constitutional defects in the Court of Appeal's judgment:

> A proper class action with a representative plaintiff will, after litigation, constitute a final judgment which is *res judicata* between the class and defendants. . . .
>
> Here, however, if Charlene Rosack lost, another class member could attempt to bring another massive lawsuit, claiming that the Rosack judgment cannot be binding since she was admittedly not representative. Neither . . . the policy of *res judicata*, nor basic judicial fairness countenance such a result; the due process clause of the Fourteenth Amendment of the U.S. Constitution certainly does not.

(Volvo Petition for Hearing at 16).

The California Supreme Court, however, refused to grant a hearing, thereby rendering the Court of Appeal's judgment directing class certification final and not subject to any further review in the state courts.

REASONS FOR GRANTING THE WRIT.

I.

CLASS CERTIFICATION WHERE THE ONLY NAMED PLAINTIFF IS NOT A MEMBER OF THE CLASS DENIES DEFENDANTS THEIR DUE PROCESS RIGHT TO CONFRONT AND FULLY ADJUDICATE CLASS CLAIMS.

The California Court of Appeal ruled below that certification of a class action where the only named plaintiff is not a member of the class is constitutionally permissible. This judgment deprives Volvo of its due process rights, and is of great national importance because of its impact on other state class actions.[6]

This Court has never decided the question of whether state court certification of a class action where the only named plaintiff is not a member of the class violates the defendant's right to due process of law under the Fourteenth Amendment of the United States Constitution.[7] It should do so now.

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[6]State courts are commonly the only forums for class actions not involving federal questions because of the limitations on diversity-based class actions in the federal courts as set forth in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). State courts are increasingly the preferred forum for bringing other types of class actions as well. For example, the California legislature recently amended California's antitrust statute in light of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) to provide expressly a treble damages remedy to indirect purchasers, and the Ninth Circuit Court of Appeals has ruled that actions brought under this statute can be maintained only in state courts. *In re Sugar Antitrust Litigation*, 588 F.2d 1270 (9th Cir. 1978). *See generally* Note, *The California State Courts and Consumer Class Actions for Antitrust Violations*, 33 Hastings L.J. 689 (1982).

[7]Volvo clearly has the right to seek review of the decision below at this time. The judgment of the California Court of Appeal certifying respondent's class action conclusively determined an original proceeding for a writ of mandamus and is a "final judgment" within the meaning of 28 U.S.C. § 1257. *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931). The fact that this case arises on an original proceeding for a writ of mandate and that it has resulted in a separate final judgment distinguishes this case from those state and federal cases involving interlocutory appeals in class actions. *See Gillette Co. v. Miner*, 51 U.S.L.W. 5013 (U.S. December 6, 1982); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

The leading case on the binding effect of class action judgments holds that state class action litigants possess due process rights. In *Hansberry v. Lee*, 311 U.S. 32, 42 (1940), this Court held that the judgment in a state class action is binding on absent class members only if the named class representatives possess the same interests and suffer the same injury as the absent class members. The Court based its holding solely upon the requirements of due process:

> [A] selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

Id. at 45.

The same requirements of due process must also protect a defendant in any state class action. Just as there is a denial of the absent class member's right to be heard if he or she is not adequately represented by plaintiff, there is also a denial of the defendant's right to be heard in *opposition to* the claims of absent class members where the named plaintiff is not a member of the class. The defendant cannot *fully and finally* adjudicate the alleged class claim where the "representative" plaintiff does not share the same interest and suffer the same injury as such absent members.[8]

---

[8]The existence of due process limits on procedural rules in state class actions was also recognized in *Richardson v. Ramirez*, 418 U.S. 24 (1974). In analyzing whether or not the California Supreme Court decision involved in *Richardson* was a non-reviewable advisory opinion because the claims of the named class representatives were moot, this Court stated that "California is at liberty to prescribe its own rules for class actions, *subject only to whether limits may be imposed by the United States Constitution. . . .*" 418 U.S. at 39 (Emphasis supplied). *Richardson* did not reach the question of whether California procedure had exceeded such limits because the record in that case established the existence of an unnamed party plaintiff with a live claim. In contrast, the court in this case found that the only plaintiff does not have, and never had, a claim against Volvo.

Defendant's due process right of confrontation and cross-examination[9] as to class claims is denied where the named plaintiff is not a member of the class. A class action achieves economies of time, effort and expense by eliminating repetitious litigation and minimizing the possibility of inconsistent adjudications involving common questions by persons similarly situated.[10] It is grounded on the notion that a representative member of the class asserts the class claims on behalf of all class members, and in so doing, eliminates multiple litigation and assures judicial economy.

At the same time, the defendant in a class action also avoids multiple litigation and is guaranteed its right to deny the class claims and to assert all applicable defenses against the class. The defendant does this by making its case against the class through the representative plaintiff. In this way, the defendant is guaranteed its right to confront the adverse party through the representative member of the class, and to cross-examine the class member on the alleged class claims by challenging the testimony of the representative plaintiff. The class action defendant is thus assured its minimum requirements of procedural due process in a civil action, including the right to confront and cross-examine the adverse party.

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[9]*Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969) (due process right to cross-examine in action for declaratory and injunctive relief challenging the constitutionality of a state labor-management relations statute). In complex antitrust cases, witnesses must be present and subject to cross-examination to give credibility and weight to their testimony and to provide "even handed justice." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Additionally, petitioners may also have a Seventh Amendment right to confront and cross-examine witnesses in civil proceedings. *See, e.g., Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 176 (1970) (Black, J., concurring).

[10]C. Wright and A. Miller, *Federal Practice and Procedure* § 1754 (1972).

Where the named plaintiff is not a member of the class, defendants' rights to confront and cross-examine the adverse party are denied. The litigation goes forward without a representative of the class as a party to the proceeding. Thus, there is no way to confront the purported class claims by cross-examining the testimony of a class member at trial. This is a denial of due process and is not "even handed justice." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

The violation of Volvo's due process rights also constitutes a denial of Volvo's right to equal protection. The Court of Appeal's decision has created two classes of California defendants: class action defendants where the rights of cross-examination and confrontation are denied and all other defendants where such rights are preserved. Volvo's equal protection rights are violated because there is no conceivable reason for singling out class action defendants for different treatment. Volvo's due process rights and property rights are thus jeopardized by an "arbitrary assignment of burdens among classes that are similarly situated", and this is a type of discrimination forbidden by the Equal Protection Clause. *See, New York City Transit Authority v. Beazer*, 440 U.S. 568, 611 (1979) (White, J. dissenting), and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[D]iscrimination may be so unjustifiable as to be violative of due process").

II.

CERTIFICATION OF RESPONDENT AS A CLASS REPRESENTATIVE DENIES VOLVO'S DUE PROCESS RIGHT TO FULLY ADJUDICATE ITS CLAIMS AGAINST A BONA FIDE CLASS.

The Court of Appeal's judgment denies Volvo's right to fully adjudicate its claims against absent class members because the lack of any injury to respondent necessarily implies that she also lacks a sufficient interest in the outcome

of the underlying antitrust action to adequately represent the purported class. *McCabe v. Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151 (1914); *Cf., Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

The Trial Court found that respondent Charlene Rosack, the sole named plaintiff, is not representative of the putative class of Volvo purchasers. The Court of Appeal "deferred" to the Trial Court's specific factual finding that plaintiff was not typical of other purchasers, but still ordered certification of the class (Appendix, A24).

According to respondent, Volvo effected a vertical retail price maintenance scheme whereby it coerced the 64 California Volvo dealers to give little or no discount from the "Monroney" sticker price (Appendix, A2). Presumably, the class of Volvo car purchasers was injured because they would have been able to negotiate discounts, or larger discounts, below the sticker price in a non-fixed market.

Based upon respondent's own theory, the person who walked into a Volvo dealer and did not negotiate for a discount below the sticker price could not have been injured. Respondent claims that the alleged price coercion only inhibited Volvo dealers from giving discounts below the sticker price. Such a theory has no impact on the person who purchased above the sticker price because he or she wanted that particular Volvo, no matter what the price.

Charlene Rosack's claim stands in sharp contrast to the class claims. The undisputed evidence is that Rosack purchased her Volvo for cash at a sum substantially above the sticker price (Appendix, A24). Rosack did not shop around for her Volvo, did not review advertising concerning Volvo prices, and did not negotiate in an effort to get a price lower than the sticker price (C.T. at 755-756). Thus, Rosack was

not injured by the alleged price fix because she bought above the sticker price and did not try to get a discount.

Rosack is not representative of a class of purchasers who were allegedly injured by a coercion not to discount prices below the sticker price. She paid a sum above the sticker price, and thus she bought her car at a price which was completely unaffected by the alleged price fix. The lack of injury means Rosack has no standing to sue, and a plaintiff without a claim cannot "represent" those who might have a claim. As the Third Circuit has noted:

> Before one may successfully institute a class action "[i]t is of course necessary generally that [he] be able to show injury to himself in order to entitle him to seek judicial relief." *Kansas City, Mo. v. Williams*, 205 F.2d 47, 51 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953). A plaintiff who is unable to secure standing for himself is certainly not in a position to "fairly insure the adequate representation" of those alleged to be similarly situated.

Kauffman, supra at 734.

Respondent concededly purchased a Volvo. But in the absence of any demonstrable injury from the alleged price maintenance scheme, that fact does not distinguish respondent from the person who shopped for a Volvo but could not afford one, the person who heard a friend complain that Volvos cost too much, or, indeed, any person with an abstract interest in how much Volvos cost.[11]

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[11]California Business and Professions Code § 16750 requires that an antitrust plaintiff must be injured in his business or property by the alleged antitrust violation. The fact that respondent has lacked any substantive interest in the underlying antitrust action *from the outset* distinguishes this case from *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403-404 (1980). *Geraghty* held that a class representative whose claim became moot after the action was filed still possessed a sufficient interest in the separate issue of class certification to adequately represent the purported class on an appeal from the denial of class certification. This Court refused to reach the question of whether such a mooted representative could adequately represent the class on the merits. 445 U.S. at 407.

This Court has historically recognized that the class action procedure cannot be utilized to elevate such abstract interests into substantive rights. Due process requires that class representatives share at least some injury, and not merely some characteristic, with the members of the class.

> The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant — not to others — which justifies judicial intervention.

McCabe v. Atchison, Topeka & Santa Fe Railway Co., *supra*, 235 U.S. at 162.

Rosack as an individual would be unable to state a claim for relief because she was not injured. The court below has in effect enlarged Rosack's substantive rights simply because she is purporting to represent a class claim. This conflicts with settled law: The fact that a case is proceeding as a class action does not in any way alter the substantive proof required to prove a claim for relief. *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978).

III.

DUE PROCESS LIMITS MUST BE IMPOSED ON THIS STATE CLASS ACTION TO PREVENT INJUSTICE AND TO DISCOURAGE ATTORNEY-GENERATED CLASS ACTIONS.

The requirement that the class representative share some injury in common with the purported class members also helps to ensure that a class of persons who have suffered the same injury as the representative *actually exists*, so that the representative's claim and the class claims will share common questions of law or fact and the representative's claim will be typical of the class claims. *See, General Telephone Co. of Southwest v. Falcon*, 50 U.S.L.W. 4638 (U.S. June 14, 1982). In the absence of this requirement, legis-

lative provisions intended to provide for "private Attorneys General" are instead transformed into means by which plaintiff's counsel functions as a "part-time regulatory agency."[12]

This is precisely what will happen in the underlying antitrust action if the Court of Appeal's class certification order is upheld. This action is almost seven years old. Yet not once during all that time has a single Volvo purchaser, other than respondent, complained about the price of Volvos. Respondent is the only purchaser, out of an alleged class of 50,000 purchasers, to have contacted an attorney. Coincidentally, respondent's attorneys have already been implicated twice in class actions which were held to provide no real benefit to "class" members and which would never have been brought but for the "lucrative incentives" to the class attorneys. *See In re Hotel Telephone Charges*, *supra*, 500 F.2d at 92, and *Cotchett v. Avis Rent A Car System, Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972).

At the same time, the ability to manufacture class representatives on such flimsy grounds encourages multiple actions and indiscriminate forum shopping, thereby undermining the very goals which class actions are intended to achieve. Again, by coincidence, respondent's attorneys previously lost a price fixing case in federal court against Volvo on behalf of five terminated Volvo dealers. That action raised many of the same issues that respondent's attorneys now seek to litigate on behalf of a purported class of aggrieved purchasers. *Kendall Motor Co. v. Volvo Western Distributing, Inc.*, No. C-72-538 W.H.O. (N.D. Cal. 1975).

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[12]*See La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973); *Huff v. N.D. Cass Co. of Alabama*, 468 F.2d 172, 179 (5th Cir. 1972).

This Court has expressly recognized the potential for misuse of the class action mechanism under such circumstances and the important role which careful scrutiny of class certification issues plays in preventing such abuses. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980). But, whereas Federal Rule of Civil Procedure 23 provides a clear procedure for avoiding such wrongs in federal class actions, the only limits on state court procedure must be derived from the due process rights of state class action litigants.

In this instance, to subject Volvo to costly and complex class litigation involving 50,000 *alleged* class members with *alleged* claims, according to plaintiff, of between $30 million and $50 million in damages on the basis of speculative allegations by a single, non-representative plaintiff, clearly exceeds the limits which due process imposes.

IV.

CERTIFICATION OF A NON-MEMBER CLASS REPRESENTATIVE DENIES VOLVO'S RIGHT TO A FINAL JUDGMENT BINDING ON ALL CLASS MEMBERS.

The Court of Appeal's certification of a non-member class representative also denies Volvo's due process right to a *final* adjudication of the underlying class action. Thus, absent Volvo purchasers may be able to mount collateral attacks on any judgment Volvo may receive against respondent in the underlying class action.[13] Absent class members were not parties to the writ proceeding in the Court of Appeal, and they will not be bound by the finding that respondent could adequately represent their interest. Thus,

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[13]*See, e.g., Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973), and *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1007 (7th Cir. 1971) (J. Stevens, dissenting). *See generally* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589 (1974).

absent class members might collaterally attack any judgment on precisely the same grounds raised by Volvo in the writ proceeding below.

Given the absence of the threshold requirement of class membership, it makes no difference how vigorously respondent defends their interests, or how convincing the evidence is in Volvo's favor:[14] Absent class members may argue that the California court never obtained jurisdiction over them so that they cannot be bound by any judgment entered. Such illusory class action judgments deny Volvo's due process rights.[15]

On the other hand, if respondent obtains a judgment against Volvo, then absent class members could reap the benefits of that judgment and Volvo may be estopped from attacking it. This result constitutes a return to the oft-rejected doctrine of "one-way intervention," and its countenance by this Court would frustrate the basic principles of fairness and judicial economy which are the only justification for class action procedures.[16]

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[14]The due process requirements of adequate representation and notice must *both* be satisfied. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-177 (1974). *See also* Note, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. Pa. L. Rev. 1217 (1974).

[15]Volvo also has standing to challenge the California court's assertion of jurisdiction over absent class members, who can only be considered to be before the court in the person of the class representative. *See Hanson v. Denckla*, 357 U.S. 235, 244-245 (1958); *Calagaz v. Calhoon*, 309 F.2d 248, 254 (5th Cir. 1962).

[16]As this Court recently noted, two of the primary justifications that led to the development of class actions were the protection of the defendant from inconsistent obligations and the provision of a convenient and economical means for disposing of similar lawsuits. *United States Parole Comm'n v. Geraghty*, *supra*, 445 U.S. at 402-403. These justifications are totally frustrated by the denial of an adequate class representative.

V.

THE DECISION BELOW IS ALSO NOT IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT ESTABLISHING CLASS MEMBERSHIP AS A PREREQUISITE FOR REPRESENTATIVE STATUS.

The holding of the California Court of Appeal that the class of all Volvo purchasers be certified with respondent named as its sole representative is also in direct conflict with numerous decisions by this Court which require that a class representative "must possess the same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216 (1974).[17]

In the leading case of *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977), this Court reversed the certification of a class action in an employment discrimination case on the basis of uncontradicted evidence that the named plaintiffs were not members of the class of discriminatees they purported to represent.

The appellate court in *East Texas Motor Freight* had certified the class *sua sponte* upon its findings that allegations of employment discrimination naturally give rise to common issues of fact and law, and that sufficient statistical evidence had been presented to establish a prima facie case of discrimination.[18] This line of reasoning is exactly anal-

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[17]*See also, Kremens v. Bartley*, 431 U.S. 119, 131 n.12 (1977); *Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Rosario v. Rockefeller*, 410 U.S. 752, 759 n. 9 (1973); *Hall v. Beals*, 396 U.S. 45, 49 (1969); and *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962). These cases all arose out of federal court class actions and were decided on the basis of Article III's standing requirement and Federal Rule of Civil Procedure 23. As discussed in Part I, *supra*, the requirements of due process in state court class actions require that the net holding of these cases should be extended to state court class actions as well: a class cannot be represented by a plaintiff who is not a member of the class.

[18]*Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 49-52 (5th Cir. 1974).

ogous to the Court of Appeal's findings below that allegations of a price-fixing conspiracy alone give rise to common issues relating to liability and fact of injury, and that generalized evidence of damages can be presented on a class-wide basis (Appendix, A21).

This Court conclusively rejected such arguments, holding that the mere fact that common questions of law or fact are typically present "does not in itself ensure that the party who has brought the lawsuit will be an adequate representative." *East Texas Motor Freight, supra*, at 405. Instead, the courts must pay careful attention to the requirement that the named class representatives be typical members of the class, and *where the evidence conclusively establishes that such "representatives" suffered no injury in common with the class members, they simply are not eligible to represent that class. Id.* at 403-404.[19]

Respondent falls squarely within the ambit of this rule. The undisputed evidence establishes that she purchased her Volvo for cash at a price $612 *above* the sticker price. Yet the alleged price conspiracy is claimed to have only inhibited Volvo dealers from giving discounts *below* the sticker price. Under these circumstances, respondent is not typical of the class she purports to represent. That was the conclusion of the Trial Court, and that conclusion was left undisturbed by the Court of Appeal.

The California Court of Appeal's certification of respondent as a class representative is therefore in direct conflict with *East Texas Motor Freight* and its precedents. The basic holding of these cases should also be applied to

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[19]The holding in *East Texas Motor Freight* is underscored by the recent decision in *Gen. Tele. Co. of Southwest, supra*, rejecting the application of a "across-the-board" approach to class injury in the absence of a specific presentation of any common issues. 50 U.S.L.W. 4638 (U.S. June 14, 1982).

state class action procedure, as certification of a non-representative plaintiff denies class action litigants substantial constitutional rights without due process of law.

VI.

THE DECISION BELOW PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION INVOLVING BASIC DUE PROCESS LIMITS ON STATE PROCEDURE IN CLASS ACTIONS, NOT HERETOFORE DECIDED BY THIS COURT.

The issue presented is whether the defendants' due process rights are denied where a class is certified in a state proceeding in which the only named plaintiff is not a member of the class. This is an issue of overriding significance to the case at bar, and of great importance to all state class actions.[20] It is respectfully submitted that this Court should resolve this issue.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Dated: December 29, 1982.

Respectfully submitted,

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[20] *See* Note 6, *supra*.

APPENDIX A.

Opinion.

In the Court of Appeal of the State of California, First Appellate District, Division Three.

Charlene P. Rosack, Plaintiff and Appellant, v. Volvo of America Corporation et al., Defendants and Respondents. 1 Civ. No. 45210. (Super. Ct. No. 200471).

Filed: May 18, 1982.

Appellant, Charlene P. Rosack, appeals from the trial court's order dismissing the class action after denial of her motion for class certification in her antitrust suit against Volvo[1] for treble damages for violation of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.). The dismissal was operative only against the class and not against the named plaintiff, Charlene P. Rosack, purporting to represent the class.

The parties raise a number of issues: (1) is the denial of class certification an appealable order? (2) do common issues of law or fact predominate, and specifically is the "fact of injury" to each member of the class capable of generalized as opposed to individualized proof? (3) is the class action unmanageable? and (4) is appellant typical of the class she purports to represent?

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[1]The defendants are Aktiebolaget Volvo, a Swedish corporation (A.B. Volvo), Volvo of America Corporation, a Delaware corporation, and Volvo Western Distributing, Inc., which was merged into Volvo of America Corporation on January 1, 1976, and ceased to exist as a separate entity. For convenience, the defendants will be referred to as "Volvo."

1. *Statement of Facts*

Appellant filed suit on March 12, 1976, on behalf of herself and a class of persons[2] representing California retail automobile purchasers between 1967 and 1976 against the manufacturer of Volvo automobiles and its United States distributors. Appellant alleges a vertical retail price management scheme whereby Volvo coerced its dealers into giving little or no discount from the "Monroney" automobile sticker price,[3] thus conspiring to artificially maintain the price of Volvo automobiles above free competitive levels in violation of California's antitrust legislation, the Cartwright Act (Bus. & Prof. Code § 16700 et seq.). The Volvo dealers, although alleged to be part of the conspiracy, are not named defendants in this action. The record does not reflect the number of dealers involved; 48 dealers throughout California filed affidavits disclaiming any part in a conspiracy with Volvo.

The complaint originally included an alleged improper tie-in of Volvo-made parts and accessories to the purchase of a Volvo automobile; defendants' demurrer to this cause of action was sustained without leave to amend. The year 1972 was set as the cut-off date for the statute of limitations. Purchasers of parts (independent of new car purchasers) and lessees were eliminated as members of the proposed class.

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[2]A class action is authorized under Code of Civil Procedure section 382, which provides in part: ". . . and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

[3]The automobile sticker price is a federally required suggested retail price, which must be affixed to the vehicle by the manufacturer, in addition to various other label information. (15 U.S.C. § 1231 et seq.)

Motions to quash by the parent company, A.B. Volvo, and by Volvo of America for lack of jurisdiction were denied.[4]

Volvo removed the case to the United States District Court for the Northern District of California; appellant moved to have the case remanded to the superior court. The United States Supreme Court ultimately ordered the case remanded to the superior court on October 19, 1976. (*Rosack* v. *Volvo of America Corp.* (N.D.Cal. 1976) 421 F.Supp. 933; *Volvo of America Corp.* v. *Schwarzer* (1976) 429 U.S. 1331.)

Appellant's motion for certification of the class and numerous opposing motions of respondents relating to class certification were consolidated for hearing in February 1978. On May 22, 1978, the court filed a memorandum of decision denying appellant's motion. The class allegations were dismissed, and a final order dismissing the class action was entered on June 21, 1978.

In its memorandum of decision, the trial court considered the central issue to be whether common questions of law or fact predominated over individual issues. The court was satisfied that existence of a conspiracy to fix prices, and that prices were in fact fixed, could be proved on a class basis. The court was unconvinced, however, that "injury" to the class members could be shown on a common basis, i.e., that each member of the class purchased at prices which

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[4]San Mateo County Superior Court rule XXVI sets out procedures for pretrial conferences and evidentiary hearings to resolve preliminary issues in class action suits brought under Code of Civil Procedure section 382 or under the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq.). These rules are patterned after the Los Angeles County Superior Court Class Action Manual (rules 401 to 470) and rule 23 of Federal Rules of Civil Procedure. In its memorandum of decision, the court indicated that a "number of informal conferences and pre-trial hearings, over a protracted period of time, have taken place in accord with the rules."

were higher as a result of the price-fixing conspiracy. Additionally, the court found that class proof of injury in this case would be unmanageable and that the named plaintiff had not shown that she was representative of the purported class. Appellant having failed to carry her burden of establishing a community of interest as a matter of fact and by a preponderance of the evidence, the trial court denied appellant's motion for certification.

2. *Appellate Review*

Respondents claim that there is disagreement among California authorities on whether an order denying class certification is appealable under the requirement of Code of Civil Procedure section 904.1 (formerly § 963) providing in essence that an appeal may be taken only from a final judgment. They point out that the "California Supreme Court has . . . stated that federal cases interpreting Rule 23 of the Federal Rules of Civil Procedure are persuasive in California class action cases" and urge us to follow the recent United States Supreme Court decision, *Coopers & Lybrand* v. *Livesay* (1978) 437 U.S. 463, holding that an order denying class certification is not appealable.[5]

California appellate courts have generally granted review of an intermediate order relating to class certification, although the procedures for seeking review have varied and the opinions have presented seemingly inconsistent views. Most of the earlier cases reached the appellate court by writ or appeal at the pleading stage after a demurrer to the class action was sustained or a motion to strike the class allegations was granted. (See, e.g., *Weaver* v. *Pasadena Tournament of Roses* (1948) 32 Cal.2d 833 [writ — no discussion of the right to review]; *Daar* v. *Yellow Cab Co.* (1967) 67

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[5]See discussion under *Standard of Review*, *infra*.

Cal.2d 695 [appeal].) In 1971 the California Supreme Court in *Vasquez* v. *Superior Court* (1971) 4 Cal.3d 800, 820-821, suggested that trial courts utilize the procedural provisions of the Consumers Legal Remedies Act (Civ. Code, § 1780 et seq.), which provides for a hearing, upon notice and motion, supported by affidavits, to determine if a class action is proper. Since that time, the majority of cases have reached the appellate court via a direct appeal from the intermediate order on certification of the class or an extraordinary writ seeking to compel the trial court to vacate or grant an order for certification.[6]

Cases holding that an order denying class certification is appealable stem from *Daar* v. *Yellow Cab Co., supra*, 67 Cal.2d 695. In *Daar* the trial court, after determining that plaintiff could not maintain a class action, sustained defendant's demurrer without leave to amend and transferred plaintiff's individual action to the municipal court. The Supreme Court held that even though an order sustaining a demurrer was not a final judgment and was nonappealable, the effect of the transfer was a determination that the complaint as a class action was legally insufficient and was "tantamount to a dismissal of the action as to all members of the class other than plaintiff." (*Id.*, at p. 699.) Thus the legal effect of the order was that of a final judgment, and an appeal would lie. (See, e.g., *Collins* v. *Rocha* (1972) 7 Cal.3d 232 [no discussion]; *Petherbridge* v. *Altadena Fed. Sav. & Loan Assn.* (1974) 37 Cal.App.3d 193; *Hamwi* v. *Citinational-Buckeye Inv. Co.* (1977) 72 Cal.App.3d 462;

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[6]In *Wechsler* v. *Laskey-Weil, Inc.* (1974) 42 Cal.App.3d 728 the appellate court, Second District, considered an appeal from an order sustaining a demurrer to class action allegations and reversed the order, noting that the Los Angeles County Superior Court had adopted a manual which requires pretrial hearings in class action suits to determine class issues.

Morrissey v. *City and County of San Francisco* (1977) 75 Cal.App.3d 903.) Unlike *Petherbridge*, *Hamwi*, and *Morrissey*, *supra*, where the plaintiff's individual action remained viable in the superior court, in *Anthony* v. *General Motors Corp.* (1973) 33 Cal.App.3d 699, the plaintiffs refused to amend their complaint to state individual causes of action, and an appeal was properly taken from the judgment of dismissal of the action.

Cases holding that an appeal will not lie from an order on class certification when the order disposes of less than all the causes of action between the parties rely on *Vasquez* v. *Superior Court*, *supra*, 4 Cal.3d 800. In *Vasquez* the demurrer to plaintiffs' first cause of action, a class action for fraud, was sustained as to the class, but the demurrer to plaintiffs' second cause of action, a class action charging violation of the Unruh Act (Civ. Code, § 1801 et seq.), was overruled. Plaintiffs sought a writ of mandate; defendants asserted that plaintiffs had an adequate remedy by appeal. The Supreme Court, affirming that an appeal under these circumstances "would violate the rule that an appeal may be taken only from a final judgment," concluded "that since plaintiffs cannot appeal from the order which bars a substantial portion of their cause from being heard on the merits, their petition for writ of mandate deserves consideration." (*Vasquez* v. *Superior Court*, *supra*, 4 Cal.3d at pp. 806-807; see, e.g., *Petherbridge* v. *Prudential Sav. & Loan Assn.* (1978) 79 Cal.App.3d 509, 513 [order refusing certification not appealable, but reviewable on appeal from judgment on plaintiff's individual action].)

Since *Vasquez*, review of an intermediate order on class certification has most frequently been through use of an extraordinary writ. (See, e.g., *City of San Jose* v. *Superior Court* (1974) 12 Cal.3d 447 [writ granted and trial court ordered to decertify class]; *Occidental Land, Inc.* v. *Su-*

perior Court (1976) 18 Cal.3d 355 [writ denied; trial court did not abuse discretion in certifying class]; *Blue Chip Stamps* v. *Superior Court* (1976) 18 Cal.3d 381 [writ granted and trial court ordered to dismiss class action portion of case], but see dis. opn. of Mosk, J., at p. 389.)

From our review of the statute and cases, we conclude that an appeal from an intermediate order on class certification violates the "final judgment rule" set forth in Code of Civil Procedure section 904.1 unless the order disposes of the entire action. A party seeking an earlier appellate review of an order on class certification must rely on a writ of mandate as provided in Code of Civil Procedure sections 1085 and 1086. We caution, however, as did the court in *Hogya v. Superior Court* (1977) 75 Cal.App.3d 122, that "willingness to consider the denial [or granting] of class certification before trial . . . should not be construed as a *right* to review of such an order in every case." (*Id.*, at p. 132, emphasis in original.) The general principles thoroughly discussed in *Hogya* require "an individual determination in each case, upon examination of both facts and issues, whether review by use of prerogative writs should be afforded." (*Ibid.*)

At this juncture, we could dismiss the appeal and thereby not reach the merits (or perhaps merely postpone reaching the merits) of the appeal. We decline, however, to do so. Appellant has justifiably relied on persuasive authority for filing an appeal rather than seeking a writ of mandate, and in the interests of justice she is entitled to have the issues considered on their merits. Accordingly, we shall treat the appeal as a writ of mandate and proceed on that basis. (See *Barnes* v. *Molino* (1980) 103 Cal.App.3d 46, 50-51; but see *DeGrandchamp* v. *Texaco, Inc.* (1979) 100 Cal.App.3d 424, 437.)

3. *Standard of Review*

"The trial court is vested with discretion to determine whether the plaintiff has sustained [her] burden of establishing the factual predicate for class action treatment. So long as that court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld. (*Occidental Land, Inc.* v. *Superior Court* (1976) 18 Cal.3d 355, 361 . . . .)" (*Hamwi* v. *Citinational-Buckeye Inv. Co.*, *supra*, 72 Cal.App.3d 462, 472, cf. *Blue Chip Stamps* v. *Superior Court*, *supra*, 18 Cal.3d 381, 389-394, dis. opn. of Mosk, J.; see generally Witkin, Cal. Procedure (2d ed., 1981 supp. to vol. 5) Extraordinary Writs, § 106, pp. 137-138.)

In reviewing the trial court's order, we are mindful that the California Supreme Court has encouraged the trial courts to utilize the procedural provisions set forth in Civil Code section 1781, subdivision (c), of the Consumers Legal Remedies Act and in rule 23, Federal Rules of Civil Procedure.[7] (See *Vasquez* v. *Superior Court*, *supra*, 4 Cal.3d 800, 820-821.) Although federal cases interpreting rule 23 are per-

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[7]Rule 23, Federal Rules of Civil Procedure, provides in part: "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of Subdivision (a) are satisfied, and in addition: . . . [¶] (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . ."

suasive, they are not binding on the state courts absent the impairment of a constitutional right. (See *Cartt* v. *Superior Court* (1975) 50 Cal.App.3d 960, 968.)

4. *The Predominance of Common Questions of Law or Fact*

The predominance of common issues requirement adopted by rule XXVI(B)(1)(b) of the San Mateo Superior Court local rules governing class actions is substantially that of Federal Rules of Civil Procedure, rule 23(b)(3). In the instant case, the question of whether common issues of fact or law predominate over individual issues turns on an interpretation of substantive issues of antitrust law. Federal cases interpreting the Sherman and Clayton Acts are applicable to the interpretation of California's antitrust legislation, the Cartwright Act. (*Mailand* v. *Burckle* (1978) 20 Cal.3d 367, 376; *Chicago Title Ins. Co.* v. *Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315.)

Certain practices in violation of the antitrust laws are deemed per se violations. Price fixing is such a practice unlawful per se under section 1 of the Sherman Act. (*U. S.* v. *Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 223.) Proof of a violation requires only evidence of a conspiracy among defendants to fix prices; no defense or justification is recognized. "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. [Citation.]" (*Id.*, at p. 226, fn. 59.) It is no defense that the price fixed was a "reasonable price" (*United States* v. *Trenton Potteries* (1927) 273 U.S. 392, 397-398); it is not necessary to show an actual effect on prices (*U. S.* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at pp. 225-226, fn. 59.)

In addition to a violation of the Sherman Act, civil liability under section 4 of the Clayton Act requires proof by the plaintiff that the antitrust violation caused him or her some injury.[8] To succeed in a private antitrust action plaintiffs must prove (1) a conspiracy to fix prices in violation of the antitrust laws, (2) that prices were fixed pursuant thereto, and (3) that as a result of the conspiracy plaintiff purchased products at prices which were higher than they should have been. (*Philadelphia Electric Co.* v. *Anaconda American Brass Co.* (E.D.Pa. 1968) 43 F.R.D. 452, 457.)

The basic considerations applicable to class certification have been summarized: "Liability in an antitrust action requires proof of two sets of facts: (1) an antitrust violation and (2) a resultant injury to plaintiffs. This latter requirement is also known as 'impact,' 'causation,' 'fact of damage,' and 'fact of injury.' If plaintiffs have stated claims of illegality and impact which can be proved predominantly with facts applicable to the class as a whole, rather than by a series of facts relevant to only individual or small groups of plaintiffs, then prosecution of this case as a class action is appropriate and desirable. [Citation.] If classwide proof of illegality and impact is not possible, the class must be

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[8]Based on section 4 of the Clayton Act, California Business and Professions Code section 16750, subdivision (a), provides in part that "Any person who is injured in his [or her] business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction . . . without respect to the amount in controversy, and to recover three times the damages sustained by him [or her], and shall be awarded a reasonable attorneys' fee together with the costs of suit. [¶] Such action may be brought by any person who is injured in his [or her] business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant. . . ." In 1978 the second paragraph above was added. Section 2 of Statutes of 1978, chapter 536, page 1696, provided: "The amendment of this section at the 1978 . . . Session of the Legislature does not constitute a change in, but is declaratory of, the existing law."

decertified." (*Presidio Golf Club* v. *National Linen Supply Corp.* (N.D.Cal. 1976) 1976-2 Trade Cases ¶ 61,221, pp. 70,627, 70,629.)

Conspiracy

There is no contention here that proof of the conspiracy and its implementation are not common questions of law and fact. The existence of the price-fixing conspiracy is the predominant common issue determinative of liability to all class members. Proof of a conspiracy to fix prices establishes a per se violation of the antitrust laws. Violation as to each class plaintiff will be proved with facts of the same conspiracy. (See *In re Sugar Industry Antitrust Litigation* (E.D.Pa. 1976) 73 F.R.D. 322, 345; *Presidio Golf Club* v. *National Linen Supply Corp.*, *supra*, 1976-2 Trade Cases ¶ 61,221, at p. 70,630.)

Impact

Proof of fact of injury (impact) as a common issue has been far more troublesome to the courts than has proof of the violation. A dominant approach has emerged as illustrated in the decision in *In re Master Key Antitrust Litigation* (D.Conn. 1975) 70 F.R.D. 23, appeal dismissed (2d Cir. 1975) 528 F.2d 5. The court addressed the requirements of section 4 of the Clayton Act and rule 23, Federal Rules of Civil Procedure, without unduly burdening parties seeking certification: "[i]f the plaintiffs introduce proof . . . at the liability stage that they bought master key systems and that the defendants engaged in a pervasive nationwide course of action that had the effect of stabilizing prices at supra-competitive levels, the jury may conclude that the defendants' conduct caused injury to each plaintiff." (*Id.*, at p. 26, fn. 3.)

"Under this approach a jury can *infer* the fact of injury when a conspiracy to fix prices has been established and

plaintiffs have established that they purchased the affected goods or services. This inference eliminates the need for each class member to prove individually the consequences of the defendants' actions to him or her. Accordingly, impact can be treated as a common question for certification purposes." (See Note, *Substantive Policies and Procedural Decisions: An Approach to Certifying Rule 23(b)(3) Antitrust Class Actions* (1979) 31 Hastings L.J. 491, 503.)

Other cases have used this approach, which we think is sound. (See e.g., *Bogosian* v. *Gulf Oil Corp.* (3d Cir. 1977) 561 F.2d 434, 455, cert. den., 434 U.S. 1086; *Hedges Enterprises, Inc.* v. *Continental Group* (E.D.Pa. 1979) 81 F.R.D. 461, 475; *Presidio Golf Club* v. *National Linen Supply Corp.*, *supra*, 1976-2 Trade Cases ¶ 61,221, at p. 70,630; *Sugar Industry* (N.D.Cal. 1976) 1977-1 Trade Cases ¶ 61,373, pp. 71,319, 71,336, affd., *In re Sugar Antitrust Litigation* (9th Cir. 1977) 559 F.2d 481; *In re Sugar Industry Antitrust Litigation*, *supra*, 73 F.R.D. 322, 346; *In re Master Key Antitrust Litigation*, *supra*, 70 F.R.D. 23, 26, fn. 3; *In re Plywood Anti-trust Litigation* (E.D.La. 1976) 76 F.R.D. 570, 584; see also *In re Folding Carton Antitrust Litigation* (N.D.Ill. 1977) 75 F.R.D. 727, 734 [impact "presumed"].)

The courts have rejected the notion that each member of the purported class must prove that he or she absorbed at least some portion of the overcharges in order to establish liability. (*Presidio Golf Club* v. *National Linen Supply Corp.*, *supra*, 1976-2 Trade Cases ¶ 61,221, at p. 70,630; *Sugar Industry*, *supra*, 1977-1 Trade Cases ¶ 61,373, at p. 71,336.) "[C]lass certification does not require that common questions be completely dispositive . . . as to all potential members of the class. [Citation.]" (*Id.*, at p. 71,335.) The fact that certain members of the class may not have been injured at all does not defeat class certification. (*In re*

Sugar Industry Antitrust Litigation, supra, 73 F.R.D. 322, 347; *Presidio Golf Club* v. *National Linen Supply Corp., supra*, 1976-2 Trade Cases ¶ 61,221, at p. 70,630.)

Comparison of Liability and Damages

Proof of impact at the liability phase is not the same as calculation of damages in the damages phase. It is sufficient to certify a class if impact as well as the conspiracy is capable of generalized proof. "The key issue in litigation of this type is the existence of a conspiracy and its effect on interstate commerce. Tactical problems inherent in arriving at a satisfactory calculation of damages must be considered, and given their appropriate weight, elsewhere in Rule 23." (*P.D.Q. Inc. of Miami* v. *Nissan Motor Corporation in U.S.A.* (S.D.Fla. 1973) 61 F.R.D. 372, 375.)

Manageability of the class with regard to proof of the amount of each class member's damages may present an independent ground for failure to certify the class. But this is not to be confused with the amenability of the causation or impact element to generalized as opposed to individualized proof. The complexity of the pricing scheme and the number of variables, although they may prove fatally unmanageable to damage calculation, will rarely inhibit generalized proof of impact. Where complexity is found to preclude class proof of impact, in fact it is either because the complexity has also foreclosed generalized proof of the conspiracy itself, or because calculation of individual damages is deemed unmanageable. (See *State of Ala.* v. *Blue Bird Body Co., Inc.* (5th Cir. 1978) 573 F.2d 309, 321; *Windham* v. *American Brands, Inc.* (4th Cir. 1977) 565 F.2d 59, 65, 67, cert. den., 435 U.S. 968.)

Market Complexity

Respondents contend that the California courts have always denied class certification where class members presented differing fact patterns. None of the cases cited by

respondents addressed the unique problems involved in antitrust class actions. We shall discuss later the federal cases cited by respondent to support their contentions.

Market variations have been examined in a number of federal cases: "[C]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected. Courts have consistently found the conspiracy issue the overriding, predominant question. [Citation.]" (*In re Folding Carton Antitrust Litigation*, *supra*, 75 F.R.D. 727, 734.)

"It is true, as the defendants urge, that there may be local variations in marketing practices and the like. It is also true that in order for all the plaintiffs to recover it must be shown that the effects of the defendants' alleged anti-competitive behavior extended to all the areas in which plaintiffs made master key purchases. But these facts do not change the central and common element of these cases — the question whether the defendants acted in concert to decrease competition among them. If this element is shown, differences in the way the plan was mainifested around the country are unimportant, except perhaps as they may affect the amounts of recovery different plaintiffs may obtain." (*In re Master Key Antitrust Litigation*, *supra*, 70 F.R.D. 23, 26.)

In *Sugar Industry* defendants claimed that, "Because the actual pricing of refined sugar and molasses fluctuated depending upon the time period, parties, localities, sugar products and distribution levels, . . . proof of a particular price change during a specific time period necessarily involves individual factual and legal issues." (*Sugar Industry*, *supra*, 1977-1 Trade Cases ¶ 61,373, at p. 71,334; see also *In re Sugar Industry Antitrust Litigation*, *supra*, 73 F.R.D. at pp. 342-343.) The court was unpersuaded, stating, at page 71,335: "In an unbroken line of decisions, courts have rejected arguments that various disparate facts relating to

the claims of potential class members preclude a finding that common conspiracy issues predominate. For example, it has been recognized consistently that differences among potential class members concerning damages do not preclude class treatment so long as common questions regarding conspiracy and impact allegations predominate. [Citations.]"

A similar argument that the linen supply business was "characterized by an extremely intricate pricing scheme in which prices differ between different items, between different suppliers, and depend in significant part on the different supplier-customer relationships" was rejected by the court in the *Presidio Golf Club* case. (*Presidio Golf Club* v. *National Linen Supply Corp.*, *supra*, 1976-2 Trade Cases ¶ 61,221, at p. 70,629.)

"If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage." (*Bogosian* v. *Gulf Oil Corp.*, *supra*, 561 F.2d 434, 455.)

"The defendants point out that the products mentioned in the complaint include 'at least twelve separate groups of products which are separately priced and have distinct end uses'; that plaintiffs may have purchased like products from other manufacturers, at prices not shown to have been affected by the alleged conspiracy; that during the period covered by the alleged conspiracy there were dozens of price changes in each product-line; and that there were wide variations in methods of purchase and in prices actually paid.

But these circumstances, it seems to me, demonstrate merely (1) the possible desirability of establishing sub-classes as the facts develop; (2) the likelihood that plaintiffs may be unable to prove all they claim; and (3) the fact that many of the issues relating to damages are individual rather than common to the class." (*Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, *supra*, 43 F.R.D. 452, 457.)

"In *City of New York* v. *General Motors Corp.*, 60 F.R.D. 393, 395 (S.D.N.Y. 1973), appeal dismissed, 501 F.2d 639 (2d Cir. 1974), the court stated: [¶] 'The defendant contends that differences among the class members regarding the manner of purchase and payment; the effect of the alleged monopolization upon physical, economic, environmental and sociological conditions; design specifications and the amounts paid make class action treatment inappropriate in this case. These factors at first blush, seem supportive of the defendant's contention, but on full consideration it becomes clear that each of these local differentiations relates solely or primarily to the question of damages and will be of little or no relevance in determining plaintiff's underlying claims.' " (*In re Sugar Industry Antitrust Litigation*, *supra*, 73 F.R.D. 322, 344.)

"In certifying a plaintiff class, the courts have found it appropriate to look past surface distinctions among the products purchased by class members or the marketing mechanisms involved when allegations of anti-competitive behavior embracing all of the various products and distribution patterns have been credibly pleaded. E.g., *In re Master Key Antitrust Litigation*, *supra* [70 F.R.D. 23]. Identical products, uniform prices, and unitary distribution patterns are not indispensable for class certification in this context." (*Shelter Realty Corp.* v. *Allied Maintenance Corp.* (S.D.N.Y. 1977) 75 F.R.D. 34, 37, app. dism. (2d Cir. 1978) 574 F.2d 656.)

Respondents' Federal Authorities

The salient feature of respondents' briefs and the trial court's memorandum decision is confusion of proof of the fact of injury at the liability phase with calculation of individual damages at the damages phase.

This overlapping of the two concepts also appears in the language of several of the cases cited by respondents. Proof of the fact of injury on a generalized basis is sometimes referred to as "manageability" of proof of the fact of injury. (See *Windham* v. *American Brands, Inc., supra*, 565 F.2d 59, 65; *State of Ala.* v. *Blue Bird Body Co., Inc., supra*, 573 F.2d 309, 328.) The imprecise use of this terminology is the source of much of the confusion evident in respondents' papers and the trial court's decision.

Respondents rely upon *Holland* v. *Goodyear Tire & Rubber Co.* (N.D.Ohio 1975) 75 F.R.D. 743 [1975-2 Trade Cases ¶ 60,522, p. 67,313], claiming that in that case the complexity of pricing and sales prevented certification of the class, i.e., promotional sales, trade-ins on old tires, discounts, and individual purchaser negotiations. The *Holland* case is inapposite here. That case involved an alleged violation of section 2 of the Sherman Act, a monopolization of the replacement automobile tire market. There was no allegation of retail price maintenance. Unlike price fixing, monopolization is not a per se antitrust violation. Injury from the monopolization cannot be presumed. The monopolist may or may not charge excess prices to the retail customer. Discussion of proof of impact in a monopoly case is thus inapplicable to a price-fixing case.

Furthermore, there was no discussion of the impact requirement in the *Holland* case. Manageability of the class at the damages phase was discussed, and the court deter-

mined that calculation of individual damages would pose unmanageable problems.

Boshes v. *General Motors Corporation* (N.D.Ill. 1973) 59 F.R.D. 589, was similarly decided on the ground of unmanageability of proof of damages. (*Id.*, at p. 599.) (The court stated, however, that "there is no longer much doubt that questions of liability can be separated from individual questions of damages." (*Ibid.*))

Windham v. *American Brands, Inc.*, *supra*, 565 F.2d 59, "[p]rimarily, . . . turned upon a finding of the unmanageability of the action as a class action. . . ." (*Id.*, at p. 65.) However, the *Windham* case frequently merges the issues of fact of injury and calculation of damages. At page 66, the court states that, "While a case may present a common question of violation, the issues of injury and damage . . . are always strictly individualized. (Fn. omitted.)" If the court means by "injury," "fact of injury," such an interpretation literally applied would foreclose any class action because liability could never be proved on a class-wide basis. Shortly thereafter, the court states that there can be no generalized or class-wide *proof of damages*. It would appear that by "injury and damage" in the previous statement the court actually means "damages." The court speaks of "the necessity of individual *proof* and calculation" (*id.*, at p. 67, emphasis added), but its discussion in fact speaks to the manageability of the calculation of damages.

The court in *Windham* also found the conspiracy itself incapable of proof on a class basis. (*Ibid.*) The case involved several theories of illegal price fixing, as well as an allocation theory and the alleged monopoly. Some plaintiffs complained of injury by some of these practices, some by other practices. "Confronted with this congeries of both separate allegations of conspiracy violations and individualized claims of injury and damage, all intertwined,

. . ." (*ibid.*) the court declined to overrule the district judge's determination that class certification should be denied.

In the case of *State of Ala.* v. *Blue Bird Body Co., Inc., supra*, 573 F.2d 309, the court denied certification of a national class, but approved a statewide class. The case was brought against the manufacturers and distributors of school bus bodies, alleging that defendants fixed prices and conspired to monopolize. The appellate court disagreed with the trial court on the fundamental question of whether the national conspiracy was susceptible of generalized proof. (*Id.*, at p. 321.) Plaintiff's evidence was found to be probative only of a possible Alabama conspiracy and did not establish a nationwide price-fixing scheme. In fact, it appeared at that point that plaintiffs planned to prove 50 different price-fixing conspiracies on a state-by-state basis. (*Id.*, at pp. 321, 323.)

The court in the *Blue Bird Body Co.* case admitted that, "If there was some uniformity in the quality and price of a school bus, then this requirement of 'impact' might cause few problems. But, given the diverse nature of the school bus market, we have difficulty envisioning how the plaintiffs can prove in a *manageable manner* that the conspiracy was indeed implemented in a particular geographical area, and that it did in fact cause damage." (*Id.*, at pp. 327-328, emphasis in original, fns. omitted.) At the statewide level, the court found that although many of the same problems existed, they occurred to a much lesser degree, and affirmed certification.

Ralston v. *Volkswagenwerk, A.G.* (W.D.Miss. 1973) 61 F.R.D. 427, is an eccentric case in this area and should not be looked to for guidance. The court in that case addressed the merits of the substantive issues, in effect requiring plaintiffs to prove at the class certification stage both the price-

fixing element of their prima facie case and the precise method of calculating their damages. The case cites virtually no authority for this novel approach. There is none. The court drew as a conclusion from its determination that plaintiffs could not prove a conspiracy to fix prices, that there was no typicality; from the failure to demonstrate the precise method of damages calculation, it concluded that the class was unmanageable. The *Ralston* case has been criticized. "The premise of the *Palston* opinion is doubtful — defendants do not have the right to require that plaintiffs in a class action present individualized proof with respect to the amount of damages." (Freeman, Current Issues in Class Action Litigation (1976) 70 F.R.D. 251, 266, fn. omitted.)

The trial court in the instant case appears to have given great weight to the fact that purchasers in the retail automobile market frequently negotiate the price of their automobile. "In a market which is notorious for haggling and negotiations in purchasing, such as the retail automobile market, such a presumption of fact of injury cannot be maintained." The effectiveness of any negotiation by the purchaser must be seen as relative, depending on whether the negotiation commences from a price which is set by a competitive market or from an artificially inflated fixed price. The good negotiator in the fixed market would presumably have gotten an even better "deal" in a competitive market. If base prices are raised, generalized injury results regardless of the purchaser's individualized negotiating abilities. The possibility that some members of the class may be injured to a lesser extent or even not at all will not, as we have seen, defeat class certification.

The trial court in the instant case found that proof of a conspiracy and of price fixing could be made on a classwide basis. Once a price-fixing conspiracy has been established, it follows that the class has been injured to some extent. At

the preliminary class certification stage of this litigation, it was sufficient to show that plaintiffs represented a class of retail purchasers who bought their automobiles during a period of minimum retail price fixing.

The finding of the trial court that "impact" was not capable of generalized proof proceeds from a misunderstanding of the antitrust law in this area. Class certification should not have been denied on this ground.

5. *Superiority of Class Action*

Federal Rule 23(b)(3) provides that a class action may be maintained if common questions of law or fact predominate *and* "a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . ." Pertinent findings include "the difficulties likely to be encountered in the management of a class action."

Although appellants address the issue of the manageability of calculation of damages in this case, it is not clear that this was a ground on which the trial court denied certification. Citing *Boshes* v. *General Motors Corp.*, *supra*, 59 F.R.D. 589, the trial judge stated that "Acknowledging that the 'amount' of damages each plaintiff sustained is not the issue, the complexities of 'proof' of damaage in this case, involving possibly 50,000 purchasers, are, as in *Boshes*, 'overwhelming.' " Neither the trial court, nor *Boshes*, the case cited, is clear as to whether it is speaking of the difficulty of proof of the fact of damage, or manageability of the calculation of damages. Respondents assume the former, appellant the latter. If the issue is the former, we have previously disposed of it *supra*; if the latter, we must agree with appellant that this action does not appear to pose extraordinary difficulties with respect to proof of the amount of damages.

The *Boshes* case involved a class conservatively estimated at 30 to 40 million persons. (*Boshes* v. *General Motors Corp.*, *supra*, 59 F.R.D. at p. 599.) "It would place an impossible burden upon any court to provide adequate notice to a proposed class of this size and thereafter to attempt to assemble and classify the transactional material required to identify the particular interest of millions of purchasers over this span of years. The mere prospect of these clerical and administrative problems would be enough to justify a determination of unmanageability. [Citations.]" (*Id.*, at pp. 599-600.) Even as to proof of impact in that case, the complexities seen by the court as fatal chiefly arose from the fact that wholesale price fixing by the manufacturer, General Motors, was alleged, which would require a showing by plaintiffs that retail dealers had passed on the overcharge to their customers. The court concluded that such a showing could not be made on a class basis. (*Id.*, at p. 600.)

The instant case involves a retail price maintenance scheme by one manufacturer, only six basic vehicle models, and a class of 50,000. *Boshes* can hardly be relied upon in coming to a determination as to the manageability of this class.

"[T]he federal courts have consistently and firmly adhered to the principle that once liability has been demonstrated, complexity or uncertainty as to the amount of damages will not preclude recovery. [Citations.]" (*In re Folding Carton Antitrust Litigation*, *supra*, 75 F.R.D. 727, 735.)

"[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate. [Citations.]" (*Bogosian* v. *Gulf Oil Corp.*, *supra*, 561 F.2d 434, 456.)

"Defendants next question the court's ability to manage this suit if class action status is granted. This is an argument, necessarily somewhat conjectural in its nature, that has not gathered strength with reiteration. This court joins with the numerous judges and commentators who have deprecated the idea of blocking class suits on threshold predictions of unmanageability." (*Shelter Realty Corp.* v. *Allied Maintenance Corp.*, *supra*, 75 F.R.D. 34, 38.)

As stated by one commentator: "The problems raised by damage calculations for numerous individual class members may be minimized by separating liability and damage issues for trial. If defendant is found not liable, the court is then spared from becoming involved with discovery problems related to damage calculations. . . .

"The deferral of damage computation until after liability has been established has thus been recognized as an effective procedure by which to manage class actions. [Citations.] The procedure further serves the expeditious litigation of class suits because a trial unencumbered with the details of damage computations provides defendants with fewer opportunities for delay.

" .....

"Separate trial of liability and damage issues would be especially appropriate in antitrust cases alleging *per se* violations of the antitrust laws. Since the jury would not have to consider the reasonableness of defendant's conduct, the liability issues could never be so interwoven with the question of damages as to be incapable of an independent submission to the trier of fact. *See Swofford v. B & W, Inc.*, 34 F.R.D. 15 (S.D.Tex. 1963), *aff'd*, 336 F.2d 406, 415 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 14 L.Ed.2d 557 (1965)." (Freeman, Current Issues in Class

Action Litigation, *supra*, 70 F.R.D. 251, 267-268, fn. omitted.)

Various practical methods have been devised to expeditiously facilitate the calculation of individual damages, including bifurcation and the creation of subclasses. (See *Link* v. *Mercedes-Benz of N. Am., Inc.* (3d Cir. 1977) 550 F.2d 860, 864, cert. den., 431 U.S. 933; *In re Master Key Antitrust Litigation, supra*, 70 F.R.D. 23, 26; *Sugar Industry, supra*, 1977-1 Trade Cases ¶ 61,373, at p. 71,338; *Bogosian* v. *Gulf Oil Corp., supra*, 561 F.2d 434, 455.) In some cases certification of the class has been granted for purposes of liability only, reserving the right to reassess the possibility of subclasses for that purpose at a later date. (*P D.Q. Inc. of Miami* v. *Nissan Motor Corporation in U.S.A., supra*, 61 F.R.D. 372, 381; see also *Bogosian* v. *Gulf Oil Corp., supra*, 561 F.2d at p. 456; *Vasquez v. Superior Court, supra*, 4 Cal.3d 800, 821.)

Speculative problems with regard to computation of damages should not have been fatal to class certification here. Any one of a number of procedures were available which would have allowed this action to proceed and which would have postponed a specific determination at this early stage of the precise formula for calculating individual damages.

6. *Is Appellant Typical of the Class She Purports to Represent?*

Finally, the trial court in this case found that plaintiff was not representative of the purported class, because her purchase at a price above the sticker price was dissimilar from that of another purchaser at approximately the same time of purchase. We defer to the trial court's factual observation, but fail to see the import thereof. Plaintiff alleges that she purchased a Volvo automobile at a point in time when the vehicle's price was controlled by the manufacturer and that

she would represent a class of like purchasers. The fact that Volvos were being sold at that time at widely variant prices goes directly to the difficulty of plaintiff's task in proving the existence of a retail price-fixing scheme, but has no bearing on her ability to represent the class of purchasers. (See our previous discussion.)

The writ is granted, and the trial court is directed to vacate its order denying class certification and to enter an order granting class certification and to proceed in a manner consistent with the views expressed herein.[9]

CERTIFIED FOR PUBLICATION.

Barry-Deal, J.

We concur:

Scott, Acting P.J.

Feinberg, J.

1 Civil No. 45210, *Rosack* v. *Volvo of America Corporation*

Trial Judge: Thomas M. Jenkins

Trial Court: San Mateo County Superior Court

Counsel for Appellant:

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[9]We have carefully considered our opinion after granting a petition for rehearing and conclude that our decision as originally filed is correct.

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APPENDIX B.

Memorandum Decision.

In the Superior Court of the State of California in and for the County of San Mateo.

Charlene P. Rosack, etc., et al., Plaintiffs, vs. Volvo of America Corporation, et al., Defendants. No. 200471.

Filed: May 22, 1982.

Plaintiff seeks certification of a class of persons who purchased new Volvo automobiles in California since January 1, 1967, alleging they were damaged by a price-fixing conspiracy of defendants in violation of the Cartwright Act (Business & Professions Code Section 16700, et seq.) In accord with *Vasquez v. Superior Court* (4 Cal.3d 800 [1971]), this Court has adopted a procedure for class action determination similar to and condensed from the Los Angeles Superior Court Class Action Manual. Essentially, it has followed the procedures set out in the Consumer Legal Remedies Act, Civil Code Section 1781, et seq.

Initially, a number of decisions and/or agreements have been reached on matters such as "tying" (demurrer sustained), statute of limitations (1972 is cut-off date), etc. Dealers, although still alleged to be part of the conspiracy, are not defendants. Parts purchasers (other than incidental to new car purchases) and lessees are not plaintiffs. Motions to quash having been denied, the parent company, A.B. Volvo, and Volvo of America remain as defendants.

Our rules provide, in Section 26B, that the Court shall consider the following class issues:

(a) Constitution of the class;

(b) Whether common issues of law or fact predominate over individual issues;

(c) Superiority of class action to other . . . methods . . .;

(d) Membership of the class representative in the class;

(e) Ability of class representative to fairly and adequately protect the interests of the class;

(f) Necessity for and content of notice.

A number of informal conferences and pre-trial hearings, over a protracted period of time, have taken place in accord with the rules.

Extraordinarily capable counsel have voluminously briefed and very competently articulated their respective positions. Without addressing the questions in detail, sufficient allegations of conspiracy have been made, and the class fixed as purchasers of new Volvos in California since 1972 to proceed to the central issue:

Do common issues of law or fact predominate over individual issues?

A determination of that question is necessary to show that a community of interest sufficient for class certification exists (*City of San Jose v. Superior Court* 12 C.3d 447 [1974]). Such community does not exist where each class member is "required to individually litigate numerous and substantial issues to establish his individual right to recover" (*Vasquez v. Superior Court, supra*).

Plaintiff has the burden to establish that a community of interests exists as a matter of fact (*Hamwi v. Citinational-Buckeye Investment Co.* 72 C.A.3d 462, 472 [1977]), by a preponderance of the evidence (San Mateo County Rule 26, § D.2.) This Court finds that plaintiff has failed to carry that burden.

In order to succeed in a private antitrust action, plaintiffs have to prove (1) that there was a conspiracy to fix prices in violation of antitrust laws, (2) that prices were fixed pursuant thereto, and (3) that plaintiffs purchased products at prices which as a result of the conspiracy were higher

than they should have been. (*Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 457 [1968]).*

There is no contention that proof of the existence of a conspiracy among defendants (individual dealers have not been named as defendants), or that prices were fixed pursuant to the conspiracy could not be shown on a common basis. The issue of whether or not a conspiracy existed is a common question of law and fact. (*City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 51 [1971]).

The central issue is whether the third element, that each member of the class purchased at prices which were higher as a result of the conspiracy, can be shown on a common basis. This element is the liability requirement, also known as "impact" or "fact of injury". (*Presidio Golf Club v. National Linen Supply Corp.*, 1976-2 Trade Cases, Paragraph 61, 221, p. 70, 629). "In this (type of) antitrust case the proof of injury to business or property of each class member is critical for the determination of defendant's liability to each individual." (*Shumate & Co., Inc. v. National Association of Security Dealers, Inc.*, 509 F.2d 147, 155 [1975]). This has been likened to the requirement for showing proximate cause in negligence actions, and the trial court has the discretion to decide whether the difficulties likely to be encountered and maintain the case as a class action outweigh the benefits and whether common questions of law and fact predominate (*Shumate, supra*, p. 155).**

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*Federal cases interpreting the Sherman-Clayton Acts are applicable to interpreting the Cartwright Act (*Chicago Title Insurance Co. v. Great Western Financial Corp.*, 69 C.2d 305 [1968].)

**California cases will look to Federal cases interpreting Federal Rules of Civil Procedure, Rule 23, to interpret California class action rules (*Daar v. Yellow Cab Co.*, 67 C.2d 695, 708 [1967]; *Vasques, supra*, p. 819; *La Sala v. American Savings & Loan Assn.*, 5 C.3d 864, 871-872 [1971]).

In support of her motion to certify the class, plaintiff originally submitted three declarations:

(1) Plaintiff Rosack's declaration which states that she purchased a new Volvo in California, that she is represented by attorney, that she recognizes her fiduciary duties to the class and that she understands that the costs of this litigation could amount to several thousand dollars.

(2) Joseph Cotchett's declaration in which he states that he is plaintiff's lawyer, has been involved in class action litigations in the past, is familiar with class action procedures and statutes, that the class of plaintiffs consists of all persons who since March 12, 1972 purchased new Volvos in California, and the class is composed of several thousand members.

(3) Ernest Pierucci's declaration in which he states he is an attorney for plaintiff and is familiar with the publication of *Automotive Age* which shows the number of Volvo automobiles registered in this state for the last three years.

Subsequently, plaintiff submitted additional documentation (not wholly admissible), including depositions from the case of *Kendall Motors v. Volvo*, C-72-538 R.F.D. (No.Dist., Calif.), relating to meetings of Volvo dealers, letters and statements of Volvo officers, and operations of Volvo in Oregon. All attempt to show a conspiracy to fix prices; none address the issue of fact of damage to each plaintiff.

Defendants argue that in this action, concerning the retail automobile market which is notorious for haggling and negotiations, plaintiff must show that each purchaser purchased his Volvo at a price above the fair market value, set by competition. Defendants contend that plaintiff cannot do this on a common basis because to show this, plaintiff must show that each dealer participated in the conspiracy and that

each purchaser, no matter how good his skills at negotiation, failed to purchase his or her automobile at a fair market price.

Plaintiff's argument as to the issue of common liability is that defendants engaged in an unlawful conspiracy that had the effect of stabilizing or increasing overall prices at levels which were above the fair market value of Volvo automobiles. In this type of a situation, plaintiff contends, fact of injury may be shown on a common basis because prices had been fixed at uniformly high levels so that any person who purchased a Volvo automobile at any given time during the conspiracy, whether or not he negotiated, was injured by the fact that he purchased at a price which was increased as a result of the conspiracy.

For this argument plaintiff posits two curves on a graph; one showing the prices at supra-competitive levels and one showing prices without the alleged price fix. It was acknowledged that many graphs, and many curves, might ultimately be required, but plaintiff argues that although the amount of damages may differ depending on each purchaser's negotiating skills, each purchaser would have been injured because the supra-competitive prices would have stayed, more or less, at a uniformly higher level than the competitive prices. By this hypothetical, plaintiff contends that fact of injury may be shown on a common basis.

This argument is conjecture. Plaintiff has presented no evidence that the prices would stay at a uniformly higher level above the non-conspiracy fixed prices, regardless of whether a purchaser negotiated for his car. Plaintiff presented no evidence or experts which would show that this argument goes beyond speculation.

A similar argument (although plaintiff seeks to distinguish it) was made in *Ralston v. Volkswagenwerk A.G.*, 61 F.R.D.

427 [1973]. There, a professor of quantitative management went into detail on the "striking similarity in profit and discount patterns among the six greater Kansas City area dealers" during certain years, as proof not only of conspiracy but fact of damage. The Court there found that "the most that is shown is that average buyers of new Volkswagons were treated similarly by the average dealer". Whether a few large discounts, or many small ones, or similar approaches for each buyer occurred, was not shown, nor the similarity of plaintiff's purchase to that of any other buyer.

Here, even less evidence was presented. Although plaintiff argues that "averages" are not involved, as in *Ralston*, the graphs suggested by her attorneys (not evidence as such) posit "medians" on Bell curves, which would differ when "free market" and "fixed-price" curves are examined. As in *Ralston*, this begs the question — what is the "fact" of damage common to each plaintiff?

However, plaintiff further argues that, in an industry dominated or controlled by the alleged conspiring defendants, once it is established that defendants engaged in an unlawful conspiracy that had the effect of stabilizing or increasing overall prices at supra-competitive levels, a presumption that each class member was individually injured may be invoked. (*Presidio Golf Club*, *supra*, at p. 70,631). The *Presidio* case did not involve purchasers who negotiated for their products. In a market which is notorious for haggling and negotiations in purchasing, such as the retail automobile market, such a presumption of fact of injury cannot be maintained. The automobile antitrust case (*P.D.Q. Incorporated of Miami v. Nissan Motor Corporation in U.S.A.*, 61 F.R.D. 372 [1973]) relied upon by plaintiff is not inapposite. It certified the class only for purposes of determining whether in fact a conspiracy existed and whether the conspiracy restrained trade and affected interstate commerce

(*P.D.Q., supra*, at p. 381), and cannot be cited for the proposition that a class was certified in an automobile antitrust case for the purposes of determining liability.

Since, in California the community of interest must be shown as a matter of fact (*Hamwi v. Citinational, supra*), plaintiff has failed to meet that burden.

There are further reasons for denying the class action. As noted in *Boshes v. General Motors Corp.* (59 F.R.D. 589 [1973]) although plaintiff might prove conspiracy and price fixing, "they must also prove that they suffered damages and, with some reasonable degree of certainty, the extent of the damages." Acknowledging that the "amount" of damages each plaintiff sustained is not the issue, the complexities of "proof" of damage in this case, involving possibly 50,000 purchasers, are, as in *Boshes*, "overwhelming". Since this Court does not accept plaintiff's "Bell-curve" theory, and no other workable formula having been presented, the variations in each purchase (model, year, discount, trade-in, financing, equipment, etc.) make class proof utterly unmanageable.

It should also be noted that plaintiff has the same problem in proving she is representative of the class (Rule 26 B 1 e, *supra*). Her purchase, for cash, at a price above the Federally required "Monroney Sticker", is not shown to be typical of any other purchaser. Defendants' declarations, not refuted, show a specific instance of sale, close in time and similar in model, at a very dissimilar price. Again, the plaintiff's burden is not met.

The Court acknowledges that it has been concerned, since defendants' position, both in response to questions and if carried to logical conclusion, effectively preclude a class action in an automobile purchase case, even if a conspiracy is blatant and proved. But neither statutory nor case au-

thority, nor in this instance the factual posture presented by plaintiff, permit a contrary conclusion.

The motion for class certification is denied. In light of that, the other motions made are not reached.

DATED: 22 May 1978.

[Illegible]
JUDGE OF THE SUPERIOR COURT

APPENDIX C.

California Statutory Provisions.

Section 16750 of the California Business and Professions Code provides in pertinent part:

"§ 16750. Actions for damages: Actions by Attorney General: Joint suits

(a) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him, and shall be awarded a reasonable attorneys' fee together with the costs of the suit."

Section 382 of the California Code of Civil Procedure provides:

"§ 382. Nonconsent to joinder as plaintiff; representative actions

If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

Section 1781 of the California Civil Code provides in pertinent part:

"§ 1781. Consumer's class action; conditions; notices; judgment

(a) Any consumer entitled to bring an action under Section 1780 may, if the unlawful method, act, or

practice has caused damage to other consumers similarly situated, bring an action on behalf of himself and such other consumers to recover damages or obtain other relief as provided for in Section 1780.

(b) The court shall permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist:

(1) It is impracticable to bring all members of the class before the court.

(2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members.

(3) The claims or defenses of the respresentative plaintiffs are typical of the claims or defenses of the class.

(4) The representative plaintiffs will fairly and adequately protect the interests of the class.

(c) If notice of the time and place of the hearing is served upon the other parties at least 10 days prior thereto, the court shall hold a hearing, upon motion of any party to the action which is supported by affidavit of any person or persons having knowledge of the facts, to determine if any of the following apply to the action:

(1) A class action pursuant to subdivision (b) is proper.

(2) Published notice pursuant to subdivision (d) is necessary to adjudicate the claims of the class.

(3) The action is without merit or there is no defense to the action.

A motion based upon Section 437c of the Code of Civil Procedure shall not be granted in any action commenced as a class action pursuant to subdivision (a). . . ."

APPENDIX D.

Respondent's Showing in Support of Class Certification.

DECLARATION OF CHARLENE P. ROSACK IN SUPPORT OF MOTION TO DETERMINE CLASS STATUS

I, CHARLENE P. ROSACK, declare as follows:

1. I am the named plaintiff seeking class certification in this action.

2. In August of 1972 I purchased a new Volvo from a retail dealer in the State of California.

3. I, and the plaintiff class herein, are represented in this matter by the law firms of Cotchett, Hutchinson & Dyer; Cartwright, Sucherman, Slobodin & Fowler, Inc.; and Harold C. Wright.

4. My attorneys explained to me the fiduciary duties owed by a class representative, such as myself, to the absent class members. I intend to abide by those duties. I know of no adverse interest I may hold as to that of any class member. I will zealously prosecute this litigation, and will promote the claims and protect the interest of absent class members to the best of my ability.

5. I understand the obligation of a representative in a class action to ultimately provide the costs of litigating such a case and to pay costs of notifying absent class members if and to the extent that the court should order me to pay such costs. I further understand that these costs could amount to several thousand dollars.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 10/29, 1977, at San Francisco, California.

/s/ Charlene P. Rosack
CHARLENE P. ROSACK

DECLARATION OF JOSEPH W. COTCHETT

I, JOSEPH W. COTCHETT, declare as follows:

1. I am an attorney at law, duly licensed to practice in the State of California, and a member of the firm of COTCHETT, HUTCHINSON & DYER, representing the plaintiff herein and the proposed class.

2. I submit this declaration in support of the plaintiffs' motion for determination of class action status and in support of the adequacy of plaintiff and of plaintiffs' counsel to represent the proposed class.

3. Our firm has been actively involved in class action litigation, involving antitrust, securities fraud, consumer fraud, interstate land sales, and common law fraud and deceit, for several years.

4. We are well versed in California Code of Civil Procedure Section 382, Federal Rule 23, and class action procedure and have sufficient manpower and resources to competently handle a case of the proportions involved in the instant litigation.

5. Associated as co-counsel in this case are the law firms of COTCHETT, HUTCHINSON & DYER; CARTWRIGHT, SUCHERMAN, SLOBODIN & FOWLER, INC. and HAROLD C. WRIGHT. These firms bring additional manpower, resources and expertise in this type of litigation.

6. We know of no other litigation pending against the named defendants or others similarly situated involving the same transaction or series of transactions.

7. The class of plaintiffs as presently framed consists of all persons who since March 12, 1972 purchased in California a new Volvo automobile manufactured, distributed and/or sold by the defendants and their local dealers.

8. The class as presently constituted would be composed of several thousand members. The exact number may be ascertained from the defendants' computerized records.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 27 day of October, 1977, at San Mateo, California.

/s/ Joseph W. Cotchett
JOSEPH W. COTCHETT

DECLARATION OF ERNEST S. PIERUCCI

I ERNEST S. PIERUCCI, declare as follows:

1. I am an attorney duly licensed to practice law in California. I am one of the attorneys for plaintiffs in this action.

2. I am familiar with the publication *Automotive Age*. It is the leading trade journal for the retail automobile sales industry in California.

3. *Automotive Age* regularly publishes statistics on new passenger vehicles registered in California.

4. I have reviewed the March 1977 and July 1, 1977 issues of *Automotive Age*. These issues contain the following information on the number of new Volvos registered in California during the indicated periods:

January - December 1975	10,527
January - March 1976	1,913

5. Attached hereto as Exhibits "A" and "B", are true and correct copies of the pages of *Automotive Age* from which I obtained the above stated information.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 25th day of October, 1977, at San Mateo, California.

/s/ Ernest S. Pierucci
ERNEST S. PIERUCCI

NEW PASSENGER VEHICLE REGISTRATION

	STATE TOTALS			47 NORTHERN COUNTIES			11 SOUTHERN COUNTIES		
	January Thru Dec. '76	January Thru Dec. '75	% Gain Loss-	January Thru Dec. '76	January Thru Dec. '75	% Gain Loss-	January Thru Dec. '76	January Thru Dec. '75	% Gain Loss-
Domestic Makes									
1 Ford	140,738	126,616	10.96	50,913	47,325	7.66	89,789	79,511	12.93
2 Chevrolet	123,239	108,815	13.26	46,201	40,104	15.20	77,035	68,711	12.12
3 Oldsmobile	41,409	26,242	57.20	17,419	11,317	53.92	23,930	14,9 5	60.74
4 Buick	41,307	28,603	44.41	14,617	11,166	31.17	26,660	17,437	52.80
5 Plymouth	36,315	18,717	99.35	15,773	8,412	87.51-	20,517	9,5 6	109.51
6 Cadillac	33,666	27,876	21.49	10,3 3	8,680	19.86	73,668	19,276	22.21
7 Mercury	31,946	26,541	20.36	13,361	11,052	20.89	18,156	15,459	19.93
8 Pontiac	31,813	20,470	55.41	13,	8,799	56.72	18,807	17,121	54.52
9 Dodge	25,050	18,811	36.30	12,183	8,549	42.51	13,467	10,262	31.23
10 Chrysler	20,391	14,652	39.17	7,320	5,397	36.56	13,021	9,255	40.09
11 American	15,764	23,033	31.30-	6,551	9,424	30.49-	9,213	14,209	35.16-
12 Lincoln	8,641	6,800	27.07	3,110	2,395	29.85	5,531	4,405	25.56
13 Checker	28	50	44.00-	12	17	29.41-	16	33	51.52-
Domestic Total	551,107	447,546	23.14	210,820	172,057	22.57	340,217	275,489	23.50
Foreign Makes									
1 Toyota	64,142	49,281	30.16	27,037	20,854	29.65	37,105	28,427	30.53
2 Datsun	54,561	58,425	6.61-	20,612	22,455	8.21-	33,949	35,970	5.62-
3 Honda	35,675	26,799	36.85	13,423	9,146	46.73	23,246	17,653	31.68
4 Volkswagen	30,298	38,411	21.12-	12,173	14,816	17.84-	18,1 5	23,595	23.18-
5 Fiat	13,427	18,800	28.58-	5,349	6,902	22.50-	8,075	11,893	32.11-
6 Colt	10,067	11,362	11.40-	4,247	5,211	18.50-	5,870	6,151	5.38-
7 Volvo	9,440	10,527	10.33-	3,600	4,161	13.48-	5,810	6,366	8.26-
8 Mercedes	9,265	9,445	1.70-	2,873	2,893	.69-	6,412	6,553	2.15-
9 Capri	9,284	10,367	10.45	3,918	4,035	2.90-	5,366	6,332	15.26-
10 BMW	8,076	5,732	40.89	3,241	2,425	33.65	4,835	3,307	46.21
11 Audi	5,708	8,397	32.02-	2,195	3,278	33.04-	3,513	5,119	31.37-
12 Mazda	5,231	14,421	63.73-	1,702	4,767	64.30-	3,529	9,654	63.45-
13 MG .	5,150	4,584	12.35	1,933	2,024	4.50-	3,217	2,560	25.65
14 Porsche	4,887	6,065	19.42-	1,751	2,179	19.84-	3,136	3,866	19.30-
15 Triumph	4,379	3,055	43.34	1,453	1,287	15.23	2,896	1,763	63.80
16 Subaru	4,141	3,306	25.35	1,412	1,247	13.23	2,732	2,059	32.69
17 Jaguar	2,026	1,781	13.76	566	482	17.43	1,450	1,290	12.39
18 Peugeot	1,981	2,150	7.72-	954	1,030	7.38-	1,030	1,120	8.04-
19 Opel	1,441	4,173	65.47-	494	1,823	72.90-	947	2,350	59.70-
20 Alfa Romeo	803	1,705	47.04-	386	608	44.70-	517	1,007	48.66-
21 Saab	831	1,069	22.26-	501	628	20.22-	330	441	25.17-
22 Renault	505	372	35.75	190	111	71.17	315	261	20.69
23 Rolls Royce	363	214	69.63	51	27	88.89	312	187	66.81
24 Ferrari	93	39	138.46	58	17	241.18	35	22	59.09
25 Cricket	37		.00	16		.00	21		.00
26 Lotus	33	98	66.33-	18	28	35.71-	15	70	73.57-
27 Citroen	30	18	66.67	8	8	.00	22	10	120.00
28 Austin	9	1,716	99.48-	4	705	99.43-	5	1,011	99.51-
29 Englod	4	1	300.00		1	100.00-	4		.00
30 Rootes	2		.00	1		.00	1		.00
31 Austin Hly	1	13	92.31-	1	2	50.00-		11	100.00-
32 Rover	1	1	.00-		1	100.00-	1		.00
33 NSU Prinz			.00			.00-			.00
34 Simca		1	100.00-			.00		1	100.00-
8 or less	45	425	89.41-	14	111	87.39-	31	314	90.13-
Foreign Total	283,052	292,754	3.31-	110,217	113,352	2.77-	172,845	179,402	3.65-
Industry Total	834,169	740,300	12.68	321,107	285,409	12.51	513,062	454,891	12.79

NEW COMMERCIAL VEHICLE REGISTRATION

	STATE TOTALS			47 NORTHERN COUNTIES			11 SOUTHERN COUNTIES		
	January Thru Dec. '76	January Thru Dec. '75	% Gain Loss-	January Thru Dec. '76	January Thru Dec. '75	% Gain Loss-	January Thru Dec. '76	January Thru Dec. '75	% Gain Loss-
1 Chevrolet	78,595	63,794	23.20	33,934	26,880	26.43	44,611	36,914	20.85
2 Ford	65,732	59,247	10.95	27,457	23,080	15.95	38,275	35,567	7.61
3 Dodge	32,414	25,920	25.05	14,215	11,351	25.23	18,190	14,559	24.02
4 Datsun	19,400	17,341	11.87	6,612	5,905	11.97	12,788	11,436	11.82
5 GMC	18,614	12,617	47.53	8,798	6,352	38.51	9,816	6,285	56.68
6 Toyota	13,678	10,811	26.57	5,513	4,637	19.02	8,165	6,179	32.14
7 Jeep	4,445	3,496	27.15	2,276	1,918	18.62	2,169	1,578	37.45
8 IHC	3,232	4,784	32.44-	1,602	2,381	32.72-	1,630	2,403	32.17-
9 Peterbilt	471	513	8.19-	208	273	23.81-	253	240	9.53
10 Freightlin	294	320	8.13-	197	216	8.80-	97	104	6.73-
11 Kenworth	203	292	9.93-	133	150	14.74-	130	136	4.41
12 Mack	176	287	37.95-	90	142	36.62-	88	145	39.31-
13 Volkswagen	13	24	45.83-	7	4	75.00	6	20	70.00-
8 or less	1,157	2,018	42.67-	371	654	43.27-	786	1,364	42.38-
Industry Total	238,486	201,464	18.38	101,453	83,514	20.00	137,023	116,970	17.19

Source Motor Registration News of California

	STATE TOTALS			47 NORTHERN COUNTIES			11 SOUTHERN COUNTIES		
	January Thru Mar. '77	January Thru Mar. '76	% Gain Loss-	January Thru Mar. '77	January Thru Mar. '76	% Gain Loss-	January Thru Mar. '77	January Thru Mar. '76	% Gain Loss-
Domestic Makes									
1 Ford	36,552	35,296	3.56	13,272	12,642	4.98	23,280	22,654	2.76
2 Chevrolet	35,543	27,407	29.69	13,090	10,115	28.14	22,463	17,192	30.60
3 Oldsmobile	14,439	8,929	61.71	6,150	3,724	65.15	8,289	5,205	59.25
4 Buick	11,164	9,044	27.80	4,297	13,294	30.45	7,267	5,750	26.38
5 Cadillac	9,744	8,052	21.01	2,810	2,406	16.79	6,934	5,646	22.81
6 Mercury	8,681	7,959	9.07	3,690	3,394	11.96	4,982	4,055	7.02
7 Plymouth	8,498	6,064	40.14	3,565	2,943	21.13	4,933	3,121	58.06
8 Pontiac	5,152	7,012	15.26	3,601	3,077	17.03	4,551	3,935	15.65
9 Dodge	6,878	5,566	23.57	3,456	2,575	36.87	3,422	3,041	12.53
10 Chrysler	5,505	4,366	27.46	2,221	1,553	43.14	3,342	2,813	18.81
11 Lincoln	2,972	2,040	45.69-	1,036	763	35.78	1,936	1,277	51.61
12 American	2,610	4,095	36.26-	1,136	1,785	36.36-	1,474	2,310	36.19-
13 Checker	18	3	500.00	3	1	200.00	15	2	650.00
Domestic Total	151,210	125,833	20.17	58,338	43,232	20.95	92,878	77,601	19.69
Foreign Makes									
1 Toyota	19,313	11,313	70.72	7,901	4,806	64.40	11,412	6,507	75.38
2 Datsun	14,693	12,550	16.99	5,488	4,601	19.28	9,205	7,953	15.67
3 Honda	11,865	7,262	63.33	4,539	2,632	72.45	7,326	4,630	58.23
4 Volkswagen	7,795	6,144	26.37	3,133	2,477	29.15	4,596	3,667	25.33
5 Colt	3,719	1,920	93.70	1,744	841	107.37	1,975	1,079	83.04
6 Fiat	3,431	3,240	5.90	1,256	1,227	4.81	2,145	2,013	6.56
7 Mercedes	2,592	2,170	74.06	8.6	6.8	17.15	1,886	1,482	27.26
8 Volvo	2,235	1,918	16.53	804	719	11.82	1,431	1,159	10.35
9 BMW	2,195	1,805	17.63	831	805	3.23	1,364	1,061	28.56
10 Capri	1,786	2,351	24.03-	735	1,028	28.50	1,051	1,323	20.56-
11 Porsche	1,048	1,228	34.20	540	443	21.90-	1,108	785	41.15
12 Subaru	1,501	806	86.23	516	210	145.71	985	556	65.27
13 Triumph	1,477	729	102.61	603	237	154.43	874	492	77.04
14 Audi	1,388	1,292	7.43	542	529	2.46	845	763	10.83
15 Mazda	1,065	1,308	18.58-	383	433	11.55-	682	875	22.05-
16 Opel	1,047	330	217.27	490	112	337.50	557	218	155.50
17 MG	924	1,005	8.06-	323	367	16.54	601	618	2.75
18 Peugeot	643	502	28.09-	314	244	28.69	329	258	27.52
19 Saab	450	225	104.44-	297	124	130.52	163	101	61.39
20 Renault	373	8	999.99	127	3	999.99	246	5	999.99
21 Jaguar	305	434	29.72-	98	127	22.83-	207	307	32.57-
22 Alpha Romeo	129	97	32.99	65	44	47.73	64	53	20.75
23 Rolls Royce	125	69	81.16	16	4	300.00	109	65	67.69
24 Ferrari	23	6	283.33	14	3	366.67	9	3	200.00
25 Lotus	15	3	400.00	14	1	366.67	1		.00
26 Cricket	9	5	80.00	3	4	25.00-	6	1	500.00
27 Citroen	4	10	60.00-	1	3	66.67	3	1	57.14-
28 Austin		2	100.00-		2	100.00-			.00
8 or less	12	6	100.00	3	3	.00	9	3	200.00
Foreign Total	80,872	58,808	37.52	31,682	22,739	39.33	43,190	36,000	36.38
Industry Total	232,088	184,641	25.70	90,020	70,971	26.84	142,008	113,670	24.98

NEW COMMERCIAL VEHICLE REGISTRATION

	STATE TOTALS			47 NORTHERN COUNTIES			11 SOUTHERN COUNTIES		
	January Thru Mar. '77	January Thru Mar. '76	% Gain Loss-	January Thru Mar. '77	January Thru Mar. '76	% Gain Loss-	January Thru Mar. '77	January Thru Mar. '76	% Gain Loss-
1 Chevrolet	19,593	15,642	25.26	8,464	6,529	29.64	11,129	9,113	22.12
2 Ford	15,926	15,310	10.56	7,186	6,309	13.90	9,740	9,001	8.21
3 Dodge	8,439	6,383	32.21	3,563	2,813	25.11	4,876	3,535	37.93
4 Datsun	4,930	3,568	37.80	1,790	1,192	50.17	3,130	2,376	31.73
5 Toyota	4,653	2,357	97.41	1,907	980	94.59	2,746	1,377	99.42
6 GMC	4,481	3,137	47.84	2,129	1,503	41.65	2,352	1,634	43.94
7 Jeep	1,090	813	34.07	505	451	11.97	585	362	61.60
8 IHC	537	678	20.80-	259	331	21.75-	278	347	19.88-
9 Peterbilt	155	61	170.40	70	24	191.67	95	37	156.76
10 Mazda	96	232	58.52-	23	67	65.67-	73	165	55.76-
11 Freightlin	81	69	17.39	47	39	20.51	34	30	13.33
12 Kenworth	65	45	44.44	33	18	83.33-	32	27	18.52-
13 Mack	35	48	27.08-	20	32	37.50	15	16	6.25-
8 or less	12	26	53.85-	6	16	62.50-	6	10	40.00-
Industry Total	61,093	48,369	26.31	25,002	20,333	27.84	35,091	28,030	25.19

Source Motor Registration News of California

APPENDIX E.

Petitioner Aktiebolaget Volvo is Sweden's largest multinational corporation, and its subsidiaries and affiliates include the following:*

VOLVO AB, S-*405 08 Göteborg, Sweden*
- Beijerinvest AB
  - Beijer Handel & Industri AB
    - Beijer Industries Inc.
      - Approved Pharmaceutical Corp.
      - A.D. Frederick Co. Inc.
      - Insoport Industries Inc.
      - Ramlosa Inc.
    - Centro-Maskin Göteborg AB
      - Centro-Metalcut Inc.
    - Morgårdshammar AB
      - Centro-Morgårdshammar (Canada) Inc.
      - Morgårdshammar Inc.
    - Scandinavian Trading Company AB
      - Scanoil Inc.
    - Wilh. Sonesson AB
      - Persöner AB
        - Rapid Granulator Inc.
      - SAB Thulinverken AB
        - SAB Harmon Industries, Inc.
- Volvo North America Corporation
- Volvo Energi AB

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*Aktiebolaget Volvo has recently reorganized its operations following its merger with one of Sweden's largest holding companies. Attorneys for petitioners are still compiling a complete list of the affiliates and subsidiaries which have resulted from that merger and subsequent stock transactions. As soon as this information, much of which must be obtained from Volvo headquarters in Sweden, is available, it will be provided to the Court in a Supplemental Appendix.

International Energy Development Corp. (A)
Fred Olsen Inc.

Petitioner Volvo of America Corporation has no subsidiaries or affiliates, but it is a wholly owned subsidiary of Volvo North America Corporation. Volvo North America Corporation's parent corporation is Aktiebolaget Volvo.

No. 82-1138
IN THE

Supreme Court of the United States

October Term, 1982

VOLVO OF AMERICA CORPORATION, a Delaware corporation; and AKTIEBOLAGET VOLVO, a Swedish corporation,
Petitioners,

vs.

CHARLENE P. ROSACK, on behalf of others similarly situated,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

PAUL, HASTINGS, JANOFSKY
& WALKER,
DANIEL H. WILLIAMS, III,
WOODSON TALIAFERRO BESSON,
KENT FARNSWORTH,
1299 Ocean Avenue,
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(213) 451-2438,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUPPLEMENTAL APPENDIX E.

As stated in Appendix E to petitioners' Petition for a Writ of Certiorari to the Court of Appeal of the State of California, petitioner Aktiebolaget Volvo recently reorganized its operations following its merger with one of Sweden's largest holding companies. An updated list of petitioner Aktiebolaget Volvo's subsidiaries and affiliates pursuant to Supreme Court Rule 28.1 includes the following:

AB Industrivården
AB Pripps Bryggerier
AB Volkerinvest
AB Volvator
AB Volvofinans
Alfort and Cronholm
Approved Pharmacuntical Corp.
Automobiles Volvo SA
Bail Equipment SA
Beijer Byggmaterial AB
Beijerinvest AB
Blackstone Sweden AB
Bonnier & Bonnier Independent Invest AB
Central Metalcut Inc.
Chanslor & Lyon Co., Inc.
Comercio E Participacao Volvo Ltda.
Consafe AB
Dorman Diesel Iran
Fastighets AB Regnbaagen
Fastighets AB Stockholms Badhus
Federal Auto Holding Bhd.
Fides A/S
Forsakrings AB Skandia
Forsakrings AB Volvia
Forss — Parator AB
Gotabanken

Hamilton Brothers Canadian Gas Company Ltd.
Hamilton Brothers Great Britain PLC
Hamilton Brothers Oil Corporation
Hamilton Brothers Petroleum Corporation
Insupport Industries Inc.
International Energy Development Corporation SA
Investment AB Oresund
Isbergs A/S
Jungers Verkstads AB
Karosseri AB H Hoglund & Co.
Morgardshammer Inc.
Motores Diesel Andinos SA
Nordica Italia SpA
OY Volvo — Auto AB
Pargesa Holding SA
Rapid Granulators Inc.
Rena Industrial Group
Scanoil Inc.
Scantrac AB
Skaane Gripen AB
Societe Franco-Suedoise de Moteurs — PRV
Stockholms Badun
Sundsvallsbanken
Svensk Intercontienental Lufttrafik AB
Swedish Motor Assemblies Sdn. Bhd.
Teijin Volvo Corporation
Thai Swedish Assembly Co. Ltd.
United Turbine AB
United Turbine AB and Co. KB
Volcom-Hungary KFT
Volvo Approvisionnement SARL
Volvo Australia Pty. Ltd.
Volvo BM AB
Volvo BM Italia SpA

Volvo Car BV
Volvo Car Corporation
Volvo Canada Ltd.
Volvo Denmark A/S
Volvo Del Peru SA
Volvo Deutschland GmbH
Volvo Distribuidora SA
Volvo do Brasil Motores E Vehiculos SA
Volvo Energi AB
Volvo Europa NV
Volvo Far East Ltd.
Volvo Finance SA
Volvo Flygmotor AB
Volvo France SA
Volvo International Development AB
Volvo Italia SpA
Volvo Norge A/S
Volvo North America Corporation
Volvo of America Corporation
Volvo Penta Deutschland GmbH
Volvo Penta Italia SpA
Volvo Penta Nederland BV
Volvo Penta UK Ltd.
Volvo Personvagnar AB
Volvo South East Asia (PTE) Ltd.
Volvo Sudamericana SACI
Volvo Trucks (Great Britain) Ltd.

Dated: January 24, 1983.

Respectfully submitted,

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& WALKER,
DANIEL H. WILLIAMS, III,
WOODSON TALIAFERRO BESSON,
KENT FARNSWORTH,
Attorneys for Petitioners.

NO. 82-1138

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1982

VOLVO OF AMERICA CORPORATION, et al.,

Petitioners,

-vs-

CHARLENE P. ROSACK, individually and on behalf of others similarly situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MEMORANDUM IN OPPOSITION BY RESPONDENT CHARLENE P. ROSACK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MEMORANDUM IN OPPOSITION BY RESPONDENT CHARLENE P. ROSACK

Respondent Charlene P. Rosack, plaintiff and class representative below, respectfully requests that Volvo's petition

for writ of certiorari be denied.

STATEMENT OF THE CASE

The petitioner's brief presents only one question upon which its request for certiorari is based:

> ". . . whether it is unconstitutional to certify a class without a named plaintiff who is representative or typical of the class and who lacks standing to pursue her individual claim."

(Pet. Brief at 3).

Volvo claims that the California Court of Appeal certified an antitrust class with a single plaintiff who is:

> "1. not typical of the class;
> 2. not representative of the class; and
> 3. not injured by the alleged antitrust violation."

(Pet. Brief at 2-3).

Petitioner Volvo is simply in error. The Constitutional question which it seeks to raise does not exist in this case. As will be demonstrated below, the Court of Appeal properly certified the class.

In so doing, the Court of Appeal specifically determined that:

(1) Common issues of law and fact, including the fact of injury or impact, predominate over individual issues;

(2) This class is manageable; and

(3) Plaintiff, Charlene P. Rosack, is a proper class representative.

It should be noted that the Court of Appeal's decision in this case was left undisturbed by the California Supreme Court, which denied Volvo's petition for hearing.[1/] Interestingly, the same issue of inadequate class representation raised in the instant petition was among those included in Defendant's Petition For Hearing to the California Supreme Court.

Specifically considered by the Court of Appeal was whether the named plaintiff

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1/ Defendant's Petition for Hearing, dated June 28, 1982, was denied by the California Supreme Court on August 25, 1982.

Rosack, was typical of the class she purports to represent. In its analysis of the relevant federal authorities on the subject, the Court of Appeal determined that she was:

> "Plaintiff alleges that she purchased a Volvo automobile at a point in time when the vehicle's price was controlled by the manufacturer and that she would represent a class of like purchasers. The fact that Volvos were being sold at that time at widely variant prices goes directly to the difficulty of plaintiff's task in proving the existence of a retail price-fixing scheme, but has no bearing on her ability to represent the class of purchasers." (Slip Op. at 29).

Furthermore, contrary to petitioners' present contentions, the Court of Appeal did not defer to a purported trial court finding that plaintiff was not typical of the class. (See Pet. Brief at 3,7). Rather, the Court of Appeal recognized but found unimportant the trial court's observation that plaintiff's purchase price was dissimilar from that of another

purchaser. In the Court's words:

> "we defer to the trial court's factual observation, but fail to see the import thereof." (emphasis added). (Slip. Op. at 29).

Thus, the Court of Appeal did not, as repeatedly contended by Volvo in its Petition, find that Charlene Rosack was not a proper class representative. To the contrary, it found that she is a proper class representative. This being so, petitioner's claimed "federal question" disappears. The petition should be denied.

PROCEDURAL HISTORY

The petitioners in this class action are Volvo of America Corporation and Aktiebolaget Volvo (sometimes referred to as "Volvo"). The Volvo entities manufacture and distribute Volvo-brand automobiles, parts and accessories.

Respondent, Charlene P. Rosack is a California resident and represents

a class of similarly situated persons who purchased in the State of California new automobiles manufactured and distributed by Volvo.

This action was filed on March 12, 1976, in the Superior Court of the County of San Mateo, California. The complaint alleges that plaintiff Rosack, and those similarly situated, purchased Volvo automobiles at prices artifically established above free competitive levels. The price-fix was alleged to violate California antitrust law, the Cartwright Act.

After a number of unsuccessful pre-trial motions by Volvo[2/], plaintiff

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2/ These included Volvo's removal to the U.S. District Court for the Northern District of California, followed by that Court's remand to state court. Volvo "appealed" that non-appealable remand order to the 9th Circuit and later to this Honorable Court. Volvo's petition in that regard was denied on March 7, 1977(#76-977). See also memorandum opinion by Mr. Justice Rehnquist dated Nov. 15, 1976 denying application for stay (No. A-395).

Rosack filed her Motion for Certification of Class on November 4, 1977. This motion, and the Volvo petitioners' many counter-motions, were argued in February, 1978. The trial court denied class certification, and on June 15, 1978, the class allegations were dismissed from the Complaint. An appeal followed; the Court of Appeal reversed the trial court's denial of class status. Volvo sought a hearing in the California Supreme Court but same was denied.

ARGUMENT

I

The Named Plaintiff's Claim is Typical of the Claims of the Class She Represents.

Petitioner contends that the California Court of Appeal has certified a class where the only named plaintiff is not a member of the class. (Pet. Brief at 11). Volvo claims that the Court of Appeal "deferred" to the trial court's specific factual find-

ing that plaintiff was not typical of other purchasers, since she purchased her automobile at a price above the "Monroney" sticker price. (Pet. Brief at 15).

This is not an accurate characterization of the record. The Court of Appeal acknowledged the lower court's factual observation as to the price plaintiff paid for her automobile, but found that observation unimportant.

In determining that plaintiff Rosack is a proper class representative, the Court of Appeal followed an unbroken line of federal decisions dealing with similar price-fixing allegations. In sum, those cases held that where the price of goods has been artificially inflated by a price fix, all purchasers of such goods suffer some economic injury. This injury occurs even in markets where price negotiation exists;

since any negotiated price is relative to the fixed "base" price, every negotiated price is likewise artificially higher as a result of the price fix. See, Presidio Golf Club v. National Linen Supply Corp. (N.D. Cal. 1976) 1976-2 Trade Cases ¶61, 221; In Re Sugar Industry Antitrust Litigation (E.D. Pa 1976) 73 F.R.D. 322, 344-45; P.D.Q. Inc. of Miami v. Nissan Motor Corp. (S.D. Fla. 1973) 61 F.R.D. 372.

In the Presidio Golf Club case, supra, defendants attempted to decertify the class, alleging that plaintiffs could not prove damage on a class wide basis since the linen business is characterized by widely variant pricing schemes based on different items, suppliers, and the supplier-customer relationship. (Id., at 70, 629).

In a well-reasoned opinion, the court followed federal authority which states

that the fact of injury can be established from proof of a price fixing conspiracy, and that the fact that individual class members may have paid different prices for the products does not foreclose class certification:

> "Plaintiffs allege that where proof of a conspiracy to fix prices exists, the fact finder is to 'presume'or infer impact - that liability and impact merge. Plaintiffs claim that proof of a conspiracy to fix prices satisfies the burden of proving liability, leaving for resolution only the issue of the amount of their recoverable damages. This Court is inclined to agree - that as a practical matter, to prove an effective conspiracy to fix prices, facts will be adduced which will tend to establish, perhaps circumstantially, that each class member was injured.
> (Id. at 70, 630, emphasis added).

The theory of the Presidio Golf Club case has been widely adopted. The Third Circuit, in Bogosian v. Gulf Oil Corp. 561 F.2d 434 (3rd Cir. 1977), wrote that class-wide damage can be

inferred from proof that a conspiracy affected prices:

> "If, in this case a nation-wide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide, the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage." Id. at 455 (emphasis supplied).

The same result was reached by the Northern District of California in the Western Sugar Industry Anti-trust Litigation, 1977 - 1 Trade Cases, paragraph 61, 373 (N.D. Cal.1976); by the Eastern District of Pennsylvania in the Eastern Sugar

Industry Anti-trust Litigation 73 F.R.D. (322 E.D. Pa. 1976); and by the United States District Court for the District of New Jersey in the City of Philadelphia v. American Oil Company, 53 F.R.D. 35 (D. N.J. 1971).

Similarly, in the Plywood litigation, In Re: Plywood Anti-trust Litigation (1976 - 1 Trade Cases, paragraph 60, 805 (E.D. Pa. 1970), manufacturers of plywood claimed in their opposition to class certification that questions of individual liability and fact of damage (negotiated purchases) precluded certification of that price fixing action. However, the class of purchasers was certified:

> "[I]f the members of each of the classes prove they purchased softwood plywood during the relevant period and that defendants conspiratorially increased or stabilized plywood prices, then the trier of fact may conclude that the requisite fact of injury occurred. There-

> fore, the fact of injury issues do not give rise to a host of individual questions which destroy the required predominance of questions common to the classes . . . Accordingly, we reject defendants' profferred argument that the prevalence of individually-negotiated transactions for the purchase and sale of plywood negates the requisite predominance of common questions under Rule 23(b)(3). Id. at 68, 484-85 (emphasis added).

The California Court of Appeal in its decision below, simply applied this and similar law to the facts before it. That Court found that factual deviation as to prices paid in singular transactions is irrelevant when the underlying claim of the class is based on an alleged price-fixing conspiracy. From this, the Court correctly concluded that the price paid by Charlene Rosack had no bearing on her ability adequately to represent the class, and that her claims were typical of the class she represents.

With no factual or legal support from the record, Volvo repeatedly maintains

that the class can consist only of those who purchased below the Monroney sticker price (Pet. Brief at 4). A recent federal decision has succinctly addressed this very issue. In Hedges Enterprises Inc. v. Continental Group (E.D. Pa. 1979) 81 F.R.D. 461, Judge Bechtle granted class certification where the class representative paid different prices for the same goods purchased by the class. The Court stated:

> "the mere fact that a representative plaintiff stands in a different factual posture is not sufficient to refuse certification . . . [t]he atypicality or conflict must be clear and must be such that the interests of the class are placed in significant jeopardy" (emphasis added) Id., at 466

Relying on the same authority as the California Court of Appeal, the Hedges court reasoned that where the named plaintiff's claims "arose out of the same general course of conduct by the

defendants and are based on the same or similar legal theories as those of the class," the requirements of Rule 23(a)(3) are satisfied. (Id., at 465.) The Hedges court cited from State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 567 (D. Minn. 1968) as follows:

> "Since the representative parties need prove a conspiracy, its effectuation, and damages therefrom -- precisely what the absentees must prove to recover - the representative claims can hardly be considered atypical."

Although petitioner does not, and cannot contend that the Court of Appeal misapplied the applicable federal authorities cited above, Volvo does maintain that Rosack's purchase above the sticker price, without negotiation, negates the existence of injury to her (Pet. Brief at 15).

At this juncture, it should be noted that the Monroney sticker states the base price of a factory - equipped model; the costs of any additional accessories

must be added to the sticker price. In fact, Charlene Rosack paid no more for her Volvo than the 'fixed' sticker price plus the 'fixed' price of the accessories she purchased.

Thus, the class representative, Rosack, has been damaged as much by the price-fix as anyone, and there is no reason to find her incapable of representing the class. This was the conclusion of the California courts.

The fact that others of the class may be "better negotiators" does not make Rosack unrepresentative. Such negotiators would work a "better" deal in both the price fixed and in the free markets. As the Court of Appeal recognized, all class members have been injured by the elevation of prices, regardless of their individual negotiating ability. Rosack's claim is therefore typical and representative of her fellow class members.

In City of Philadelphia v. American Oil Company, 53 F.R.D. 45 (D.N.J. 1971) in which several oil companies were charged with conspiring to fix the retail price of gasoline, the court found the named plaintiffs' claims typical despite the fact that different class members paid different prices for their gasoline. In this connection, the court stated as follows:

> "Because certain plaintiffs purchased in large quantities at substantially lower prices than others does not make their claims atypical. What is alleged here is an overall conspiracy affecting all prices. Thus, the proof needed to demonstrate this will be the same irrespective of whether one purchased in 500 gallon quantities or from retail service stations." (emphasis added) Id. at 68.

Thus, the Court of Appeal was entirely correct in finding Charlene Rosack a proper representative of the class. The Court's finding was a proper application of a consistent line of federal

authorities on the subject and should be left intact.

II

Petitioner Has Not Presented A Federal Question To This Court.

As the foregoing discussion and the record below clearly demonstrate, the California Court of Appeal properly found Charlene Rosack an adequate class representative. Therefore, petitioner's due process claims, found in arguments I through VI of the petition, possess neither factual nor legal justification.

Because Rosack is a proper class representative, this Court is not presented with the task petitioner wishes the Court to undertake. This Court need not decide the constitutionality of a "headless" class in this state-law antitrust context. (See Pet. Brief at 11, 13, 17, 21, 23) Nor is this Court presented with any class certification

issue which conflicts with this Court's holding in East Texas Motor Freight v. Rodriguez, (1977) 431 U.S. 395.

In Rodriguez, this Court explored the necessity of having adequate and representative named plaintiffs in an employment discrimination situation. In that case, this Court found the named plaintiffs to be inappropriate class representatives based, inter alia, on the following:

1. The named plaintiffs did not move for class certification;

2. The plaintiffs stipulated that they were not discriminated against when first hired;

3. The only issues addressed at the trial level were individual to these plaintiffs; and

4. Their claims conflicted with those of the union membership.

(Id. at 404, 405)

The Court specifically noted that

the named plaintiffs in Rodriguez did not suffer injury in common with the other class members.

The instant case presents a completely different situation. Here, as the Court of Appeal specifically found, Charlene Rosack has been injured by the alleged price-fix in the same way all other purchasers of Volvo automobiles during the relevant period. Thus, the Court of Appeal correctly determined that she is a proper class representative.

CONCLUSION

Volvo has not presented any federal or constitutional question to this Court. In the proceedings below, the California courts determined that this state-law antitrust action could properly proceed on a class action basis and that the named plaintiff, Charlene Rosack, is an appropriate class representative. Nothing in the decisions below conflicts with

with federal constitutional guarantees or even with federal case law on class issues.

Volvo's petition raises no questions meriting the attention of this Court. It is respectfully requested that the petition be denied.

Dated: February 3, 1983

Respectfully submitted,

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By SUSAN ILLSTON
SUSAN ILLSTON
ATTORNEYS FOR RESPONDENT
CHARLENE P. ROSACK

POS-1

PROOF OF SERVICE BY MAIL
PURSUANT TO 28 U.S.C.
and C.C.P. §§ 1013(a), 2015.5

I am a citizen of the United States; my business address is Bank of California Building, 4 West Fourth Avenue, Suite 500, San Mateo, California, 94402; I am employed in the County of San Mateo, where this mailing occurs; I am over the age of eighteen (18) years and not a party to the within cause. I served the within MEMORANDUM IN OPPOSITION BY RESPONDENT CHARLENE P. ROSACK TO PETITION FOR A WRIT OF CERTIORARI on the following persons on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in San Mateo, California, addressed as follows:

Paul, Hastings, Janofsky &
Walker
Daniel H. Williams, III,
Woodson Taliaferro Besson,
Kent Farnsworth,
1299 Ocean Avenue,
Fifth Floor,
Santa Monica, CA 90401.

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 1983, at San Mateo, California.

Mary T. Cesped

MARY T. CESPED

No. 82-1138

IN THE

Supreme Court of the United States

October Term, 1982

VOLVO OF AMERICA CORPORATION, a Delaware corporation; and AKTIEBOLAGET VOLVO, a Swedish corporation,

Petitioners,

vs.

CHARLENE P. ROSACK, on behalf of others similarly situated,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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CHARLENE P. ROSACK, on behalf of others similarly situated,

Respondent.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The California Court of Appeal Has Certified a Class Where the Only Named Plaintiff Is Not Representative or Typical of the Class.

Respondent concedes that the Trial Court found that the plaintiff was "not representative" of the purported class. (Memo. Opp. at page 4). Respondent also concedes that the Court of Appeal "deferred" to this finding. (Memo. Opp. at page 5). But respondent argues that there is no constitutional question presented by the California Court of Appeal's decision because that court nevertheless ruled that the class must be certified with respondent as "class representative." (Memo. Opp. at page 3).

This argument is patently circular. It is precisely this amazing ruling that Volvo is attacking. The only question on this writ is whether it is unconstitutional to certify a class with a named plaintiff who is *not* representative or typical of the class. Incredibly, the California Court of Appeal has ruled that such a certification is permissible. And it is precisely this incredible ruling that Volvo challenges as an unconstitutional denial of due process.

The authorities which demonstrate that such "headless" class actions are unconstitutional are set forth in Volvo's petition and will not be repeated here. Respondent does not contest these authorities, but instead seeks to mischaracterize the holding of the California Court of Appeal.

II.

The California Court of Appeal Expressly Held That an Uninjured Plaintiff Could Represent an Injured Class.

Respondent concedes that she paid $612 more than the sticker price for her Volvo. Further, respondent concedes that the Court of Appeal ruled that the fact she paid more than the sticker price and therefore could not have been injured "has no bearing on her ability to represent the class of purchasers." (Memo. Opp. at page 4). The reason for this outrageous result is that the Court of Appeal held that, regardless of the actual price paid, a generalized injury to every Volvo purchaser can be presumed from the mere allegation that a price-fixing conspiracy existed:

> If base prices are raised, generalized injury results regardless of the purchaser's individualized negotiating abilities. The possibility that some members of the class may be injured to a lesser extent or *even not at all* will not . . . defeat class certification.

(Appendix, A20, emphasis supplied).

Respondent's argument that she was injured by an alleged conspiracy to "fix" the federally-mandated sticker price on Volvo automobiles sidesteps this issue completely and does not dispute the clear rule established in the cases decided by this Court and cited by Volvo which hold that such "across-the-board" presumptions in class actions are unconstitutional. *General Telephone Co. of Southwest v. Falcon*, 50 U.S.L.W. 4638 (U.S. June 14, 1982); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977).

III.

Respondent's Argument That She Was Injured Because the Federal Sticker Price Was Fixed at an Uncompetitive Level Is Contrary to the Record in This Case and the Law.

Respondent has *conceded* that if she is not a member of the purported class of injured Volvo purchasers, then her certification as a class representative violates Volvo's constitutional right to due process. (Mem. in Opp. page 18). Respondent argues for the first time in this case that she was injured by an alleged conspiracy to "fix" the federally-mandated sticker price on Volvo automobiles. (Mem. in Opp. at pages 15-16).

Respondent's argument lacks any support in either the record in this case or in other case precedents. The sticker price is indeed fixed, but it is *legally fixed by federal statute and it cannot provide the basis for any antitrust claim. In re Nissan Antitrust Litigation*, 577 F.2d 910, 916 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

The fact that respondent is *compelled* to make such an argument demonstrates the fatal flaw in her purported class action:

(1) Respondent alleges that the prices paid for Volvo automobiles were illegally "fixed" at non-competitive levels.

(2) Respondent further alleges that Volvo prices were "fixed" as a result of a conspiracy between Volvo and all of its dealers to refuse to give customers discounts off the sticker price.

(3) But respondent paid *$612 more than the sticker price* and therefore cannot have been injured by any alleged price-fixing conspiracy.

If respondent were simply less successful than most customers in negotiating a "fixed" discount, she might claim to have been injured. But it is an uncontested fact that respondent did not conduct any price negotiations at all. She was willing to and did pay a premium above the sticker price for her Volvo. Under these circumstances, respondent cannot have been injured by any anticompetitive conduct and so cannot represent a class of purchasers who allegedly were injured.

IV.

None of the Case Authorities Cited by Respondent Apply to the Facts of This Case.

The bulk of respondent's opposition papers consists of an analysis of federal antitrust class action precedents. But all of the cases cited by respondent involve alleged price-fixing conspiracies in which the base price was fixed by illegal conduct.[1]

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[1]Thus, the cases cited by respondent involve sales of linen supplies, *Presidio Golf Club v. National Linen Supply Corp.*, 1976-2 Trade Cases ¶61,221 (N.D. Cal. 1976); filling station leases, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3rd Cir. 1977); sugar, *Eastern Sugar Anti-trust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); plywood, *In re Plywood Anti-trust litigation*, 1976-1 Trade Cases ¶60,805 (E.D. Pa. 1971); and paper bags, *Hedges Enterprises Inc. v. Continental Group*, 81 F.R.D. 461 (E.D. Pa. 1979).

There is not a single case, whether federal or state, which holds that a statutorily-mandated sticker price could be illegally fixed.

Similarly, all of the cases cited by respondent involved negotiated prices *relative to* a fixed price. Not one of these cases holds that a class representative who does *not* negotiate and suffers *no* injury can nonetheless adequately represent an injured class.

V.
Conclusion.

The California Court of Appeal has certified an uninjured plaintiff as the representative of a purported class of 50,000 Volvo purchasers with an alleged exposure estimated by plaintiff to be between $30 million and $50 million. As shown in Volvo's Petition, the California court's ruling has denied Volvo's due process rights to *fully* adjudicate its defenses to the claims of absent class members because of the absence of a representative plaintiff, and to *finally* adjudicate those claims because of the possibility of collateral attack.

Respondent has conceded that this result is constitutionally impermissible, and her argument that it is not the result in this case is without merit. The sticker price on Volvos cannot possibly have been fixed by an illegal conspiracy and the fact that respondent paid a premium above that price for her Volvo cannot possibly give rise to an antitrust claim. To embroil Volvo in a costly and complex class action on

the basis of these facts constitutes a denial of due process which petitioners respectfully submit merits review and redress by this Court.

Dated: February 16, 1983.

Respectfully submitted,

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